And thus Tax Whistleblowing was born !

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DOCTRINE

And thus Tax Whistleblowing was born! Comment on the Directive on whistleblowers in Tax Matters

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SAMENVATTING

De Europese Unie, die lange tijd is achtergebleven, heeft eindelijk, eind 2019, een algemene beschermingsregeling voor klokkenluiders aangenomen. De "richtlijn inzake de bescherming van personen die inbreuken op het Unierecht melden", kortom de "klokkenluidersrichtlijn", beoogt de doeltreffendheid van het Unierecht op bepaalde specifieke beleidsterreinen te versterken door via de bescherming van klokkenluiders een reeks gemeenschappelijke minimumnormen vast te stellen. De gebieden en handelingen van de Europese Unie waarop de richtlijn betrekking heeft, zijn talrijk. De fiscaliteit is geen uitzondering. Een klokkenluider die een door een bedrijf opgezette grensoverschrijdende belastingregeling als frauduleus of onrechtmatig meldt, zou in de toekomst in principe moeten worden beschermd op grond van de klokkenluidersrichtlijn.

Na een stand van zaken van het toepassingsgebied van de richtlijn, waarbij de nadruk wordt gelegd op de fiscale gevolgen ervan, biedt dit artikel een kritische evaluatie van de belangrijkste beginselen van de richtlijn: enerzijds de verplichting voor particuliere en openbare entiteiten alsmede de bevoegde autoriteiten om meldingskanalen in te stellen; anderzijds de bescherming van personen die te goeder trouw en volgens de vastgestelde procedure inbreuken op het Unierecht melden. Dit alles wordt verder uitgediept op fiscaal gebied.

RESUME

Longtemps à la traîne, l'Union européenne s'est enfin dotée, à la fin de l'année 2019, d'un régime général de protection des lanceurs d'alerte. La « directive sur la protection des personnes qui signalent des violations du droit de l'Union », en abrégé la « directive sur les lanceurs d'alerte », tend à tirer parti de la protection des lanceurs d'alerte, par l'établissement d'une série de standards communs minimums, en vue de renforcer l'effectivité du droit de l'Union dans certains domaines de politiques spécifiques. Les domaines et actes de l'Union européenne concernés par la directive sont nombreux. La fiscalité n'y échappe pas. Le lanceur d'alerte qui dénonce un dispositif fiscal transfrontière mis en place par une société, en ce qu'il est frauduleux ou abusif, devrait en principe être protégé à l'avenir au titre de la directive sur les lanceurs d'alerte.

Après avoir fait le point sur le champ d'application de la directive, en soulignant ses implications fiscales, le présent article livre un examen critique des grands principes établis par la directive: d'une part, l'obligation, pour les entités privées et publiques ainsi que pour les autorités compétentes, d'établir des canaux de signalement; d'autre part, la protection des personnes qui signalent de bonne foi et conformément à la procédure prévue des violations du droit de l'Union. Le tout est approfondi dans le domaine fiscal.

Introduction

1. Two events specially precipitated the adoption of a comprehensive legal framework to protect whistleblowers in general and tax whistleblowers in particular.

The increase in the number of *leaks* from people presented by the press as "*whistleblowers*" initially had the effect of a catalyst. One thinks in particular of the "*Lux Leaks*" as soon as they gave rise to judicial treatment by national judges[3], making it possible to highlight the strengths and weaknesses of the caselaw of the European Court of Human Rights in the area of "whistleblowing cases"[4] as well as the difficulties linked to tax matters. The famous "*Panama Papers*", the largest data leak to date, dealt the final blow by focusing

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3. For a comment of the judicial dimension of the "*Lux Leaks*" case, see E. Cobbaut, "L'encadrement de l'alerte et la protection du lanceur d'alerte (*whistleblower*): l'affaire *Luxleaks* à l'aune d'un cadre européen en construction", *RDTI* 2019, nr. 2, p. 47-85. See also M. Nelles, "Le procès *Luxleaks*, prémices d'un retournement de situation en faveur des lanceurs d'alerte?", *JLMB* 2018, No. 38, p. 1803-1806.

4. For a review of the "whistleblowing" caselaw, V. Junod, "La liberté d'expression du whistleblower. Cour européenne des droits de l'homme (Grande Chambre), *Guja c. Moldova*, 12 février 2008", *RTDH* 2009, No. 77, p. 227-260; V. Junod, "Lancer l'alerte: quoi de neuf depuis Guja? (CEDH, *Bucur et Toma c. Roumanie*, 8 janvier 2013)", *RTDH* 2014, No. 98, p. 459-482; K. Rosier, "Chapitre III. Hypothèses dans lesquelles une violation des obligations de secret ou de confidentialité pourrait être admise, Section 1. *Whistleblowing*" in S. Gilson, K. Rosier, A. Roger and S. Palate (dirs.), *Secret et loyauté dans la relation de travail*, Waterloo, Kluwer, 2013, p. 129-150; Q. Van Enis, "Une solide protection des sources journalistiques et des lanceurs d'alerte: une impérieuse nécessité à l'ère dite de la 'post-vérité'?" *in* Y. Ninane (dir.), *Le secret*, Limal, Anthemis, 2017, p. 95-151.

political and public attention on the role of whistleblowers in the fight against tax fraud and evasion in favour of greater tax transparency. Adopted in the context of the two above-mentioned scandals, the "trade secrets" Directive[5] then put on the political agenda the adoption of a comprehensive legal framework in favour of whistleblowers insofar as it seems to recognise as much as to threaten the phenomenon of whistleblowing.[6]

2. In response to the European Parliament's requests[7], the European Commission finally tabled a proposal for a directive "on the protection of persons reporting on breaches of Union law" on 23 April 2018.[8] The proposal follows two public consultations. The first, general, under the coordination of DG JUST; the second, focused on tax issues, under the coordination of DG TAXUD with the members of the *Platform on Tax Good Governance*.[9]
The tax field has been the subject of strong disagreements.[10] So much so that it was decided to remove the tax aspects from the Directive and to regulate them by means of a separate text adopted unanimously.[11] In the end, however, the proposal for a directive on whistleblowers continued the legislative process without altering its tax aspects. Adopted at first reading by the European Parliament on 16 April 2019, the Directive was adopted by the Council of the European Union on 7 October 2019.[12] The consensus reached in the tax field is likely to be found in a clause stating that the Directive "does not harmonize provisions relating to taxes, whether substantive or procedural, and does not seek to strengthen the enforcement of national corporate tax rules, without prejudice to the possibility of Member States to use reported information for that purpose".[13]

3. After taking stock of the scope of the Directive in tax matters (I.), this paper critically examines the two main rules that the Directive lays down: the obligation to establish safe and specific reporting channels (II.) and the protection of persons reporting breaches of Union Law (III.). All this is examined with regard to the specific area of taxation.[14]

I. The Scope of the Directive on whistleblowers

4. The personal scope of the Directive on whistleblowers is extensive in that it is not limited to the "workers". Nevertheless, it does not go so far as to include "private citizens" (A.). In the tax area, however, whistleblowing is often the result of a person who acts within the framework of his or her private life.

The material scope of the Directive has been confined to the areas of Union action where it is necessary to strengthen the application of the law because weaknesses have been detected (B.). In the field of taxation, this has the consequence of limiting the Directive to breaches relating to the internal market.

A. Personal Scope

5. The Directive, which is soberly entitled "Directive on the protection of persons who report breaches of Union Law", does not apply to "whistleblowers" as such. It concerns "*reporting persons*". Nonetheless, the preparatory work, as well as the Recitals of the Directive, refers without the slightest ambiguity to "*whistleblowers*".[15]

The Directive on whistleblowers applies in practice to persons acting in a work-related context (1.). This excludes "*private citizens*" (2.), but also persons who act in return for a financial reward, that is the "*tax informants*"

5. Directive (EU) No. 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (*OJEU*, L. 157, 16 June 2016).
6. For a comment on the "trade secrets" Directive in the light of the "tax whistleblowing" phenomenon, see, A. Lachapelle, "Le lancement d'alerte (*whistleblowing*), une atteinte au secret financier voulue par l'autorité?", *RIDC* 2019, No. 1, p. 98-104.
7. "Fair Taxation: The Commission sets out next steps to increase tax transparency and tackle tax abuse", Press release, Strasbourg, 5 July 2016, available at www.europa.eu (accessed November 2, 2019).
8. Proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, COM (2018) 218 final, 23 April 2018 (hereinafter: "Proposal for a directive of the 23 April 2018"). For a brief comment on the Proposal for a directive, see D. Kafteranis, "Protection of Whistleblowers in the European Union: The Promising Parliament Resolution and the Challenge for the European Commission", *Oxford Business Law Blog*, 14 December 2017, available at www.law.ox.ac.uk (accessed June 30, 2019).
9. European Commission, Platform for Tax Good Governance, The Commission's Initiative on Protecting Whistleblowers, DOC: Platform/28/2017/EN, available at www.ec.europa.eu/taxation_customs/sites/taxation/files/platfrom_wistlebolowers.docx.pdf (accessed February 19, 2018).
10. The Directive on whistleblowers may only be applied uniformly among Member States if the breaches of tax evasion and tax avoidance share a harmonised definition in the cross-border and corporate tax context. However, this is not currently the case (see A. P. Dourado, "Whistle-Blowers in Tax Matters: Not Public Enemies", *Intertax*, Vol. 46, Iss. 5, 2018, p. 424). Moreover, the Directive on whistleblowers is subject to the ordinary procedure, which requires a qualified majority, whereas the tax area requires unanimity as a rule.
11. E. Lamer, "La protection des lanceurs d'alerte menacée", *Le Soir+.be*, 21 December 2018 (accessed December 26, 2018).
12. Directive (EU) No. 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (*OJEU*, L. 305, 26 november 2019). Hereinafter: "Directive on whistleblowers". As a rule, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021 (art. 26, 1.). By way of derogation, as regards legal entities in the private sector with 50 to 249 workers, Member States shall by 17 December 2023 bring into force the laws, regulations and administrative provisions necessary to comply with the obligation to establish internal reporting channels (art. 26, 2.).
13. Recital 18 of the Directive on whistleblowers.
14. For a general comment on the Directive on whistleblowers, see D. Pollet-Panoussis, "La protection renforcée des lanceurs d'alerte dans le cadre de l'Union européenne", *Les Petites Affiches* 2020, No. 40, p. 9-15; A. Lachapelle, "L'encadrement juridique de la dénonciation par un lanceur d'alerte au sein de l'Union européenne: commentaire de la Directive sur les lanceurs d'alerte", *RDTI* 2019, No. 4, in press.
15. See Recital 1 of the Directive.

("*aanbrenger*" in Dutch or "*aviseur (fiscal)*" in French), in other words the "*bounty hunters*".

1. *Persons acting in a work-related context*

6. The Directive on whistleblowers applies to persons acting in a work-related context, in this case "workers" (a)). By extension, it also applies to relatives of the reporting persons and to facilitators, as well as legal entities with which reporting persons are connected in a work-related context (b)).

a) Workers

7. The proposal for a directive of 23 April 2018 defined the notion of "reporting person" as a "natural or legal person who reports or discloses information on breaches acquired in the context of his or her work-related activities".[16]
It is not common practice to grant "whistleblower" status to a legal person. This choice can be explained by the filiation that the notion of whistleblowing shares in European Union Law with the French concept of "*alerte éthique*".[17] Born in the context of health and environmental monitoring, an alert can be launched by a vigilant citizen, a worker, a public monitoring agency or a non-governmental organization. Nevertheless, the French Act "*Sapin II*"[18], whose personal scope is very broad, did not extend the notion of "whistleblower" to legal entities. Such an extension is in fact irrelevant. A legal entity does not expose itself to a risk of reprisals comparable to that faced by a whistleblower.[19] However, it is this risk, which is closely linked to the whistleblower's position of (economic) vulnerability, that justifies the development of specific protection at the legal level. The Directive stresses that "where there is no such work-related power imbalance, for instance in the case of ordinary complainants or citizen bystanders, there is no need for protection against retaliation".[20]
It is therefore right, in our view, that the reference to legal persons has disappeared in the text adopted on 16 April 2019.[21]

8. In the aftermath of Recommendation CM/Rec(2014)7[22] and the "*Guja*" caselaw[23], the notion of "whistleblower", or more precisely "reporting person", refers in the Directive to "a natural person who reports or publicly discloses information on breaches acquired in the context of his or her work-related activities".[24]
The "work-related context" is broadly understood.[25] Effective enforcement of European Union Law requires protection to be applied to the widest possible range of categories of persons who, by virtue of their work-related activities, "have privileged access to information on breaches that it would be in the public interest to report and who may suffer retaliation if they report them".[26] Protection should then cover all persons linked in the broadest sense to the organization in which the breach occurred. This could include contractors or consumers who, without being subject to a duty of confidentiality or loyalty towards their service provider, have acquired the information reported in a privileged position.[27]

16. Art. 3, 9. of the Proposal for a directive of 23 April 2018.
17. On the filiation of the notion of "*whistleblowing*" in Europe, see A. Lachapelle, "Le lancement d'alerte (*whistleblowing*), une atteinte au secret financier voulue par l'autorité?", *RIDC* 2019, No. 1, p. 67-72.
18. For a comment om the French Act "*Sapin II*", see A. Lachapelle, "La déclaration d'informations ('*reporting*') comme outil de lutte contre la criminalité financière: commentaire de la décision n° 2016-741 du Conseil constitutionnel français", *TFR* 2017, p. 422-432.
19. However, the legal person that "blows the whistle" is not deprived of any protection as long as it exercises a fundamental freedom, freedom of expression, and may be recognized as a "watchdog" under the caselaw of the European Court of Human Rights. See ECHR (gr. ch.) 22 April 2013, *Animal Defenders International / United Kingdom*, § 103; ECHR (1st sect.) 27 May 2004, *Vides Aizsardzïbas Klubs / Latvia*, § 42; ECHR (2nd sect.) 14 April 2009, *Tarsasag a Szabadsagjogokert / Hungary*, § 27; ECHR (gr. ch.) 8 november 2016, *Magyar Helsinki Bizottsag / Hungary*, § 166. For a comment on the *Magyar* judgment in tax matters, see A. Van de Vijver and S. De Raedt, "Journalisten en ngo's: toegang tot fiscale bestuursdocumenten?", *TFR* 2018, p. 451-454.
20. Recital 36 of the Directive on whistleblowers.
21. In november 2018, the European Parliament still referred to "legal persons" in its definition of "reporting persons" (art. 3, 9. of the Draft European Parliament legislative resolution of 26 november 2018). It should be noted that the European Parliament has worked closely with French actors advocating the extension of whistleblower protection to legal persons. See "Lancement d'alerte. Bilan de l'année et perspectives" (V. Rozière's statements) in *5e Salon du livre de lanceuses et lanceurs d'alerte. Des livres et l'alerte*, organized by *Le Presse Papier* and a group of volunteers, Montreuil, 22, 23 and 24 november 2019. Virginie Rozière, a former Member of Parliament, led the European Parliament's fight for the adoption of a European directive to protect whistleblowers.
22. Recommendation CM/Rec (2014)7 on the protection of whistleblowers adopted by the Committee of Ministers of the Council of Europe on 30 April 2014. Hereinafter: "Recommandation CM/Rec(2014)7".
23. ECHR (gr. ch.) 12 February 2008, *Guja / Moldova*, § 97. For a review of the "*Guja*" caselaw, see V. Junod, "La liberté d'expression du whistleblower. Cour européenne des droits de l'homme (Grande Chambre), *Guja c. Moldova*, 12 février 2008", *RTDH* 2009, Nr. 77, p. 227-260; V. Junod, "Lancer l'alerte: quoi de neuf depuis *Guja*? (Cour eur. dr. h., *Bucur et Toma c. Roumanie*, 8 janvier 2013)", *RTDH* 2014, No. 98, p. 459-482; K. Rosier, "Chapitre III. Hypothèses dans lesquelles une violation des obligations de secret ou de confidentialité pourrait être admise, Section 1. *Whistleblowing*" in S. Gilson, K. Rosier, A. Roger and S. Palate (dirs.), *Secret et loyauté dans la relation de travail*, Waterloo, Kluwer, 2013, p. 129-150; Q. Van Enis, "Une solide protection des sources journalistiques et des lanceurs d'alerte: une impérieuse nécessité à l'ère dite de la 'post-vérité'?" in Y. Ninane (dir.), *Le secret*, Limal, Anthemis, 2017, p. 95-151.
24. Art. 5, (7) of the Directive on whistleblowers.
25. "Work-related context" "means current or past work activities in the public or private sector through which, irrespective of the nature of those activities, persons acquire information on breaches and within which those persons could suffer retaliation if they reported such information" (art. 5, (9) of the Directive on whistleblowers). The text almost entirely comes from Art. 3, (10) of the Proposal for a directive of 23 April 2018 and from Art. 6, (9) of the European Parliament legislative resolution of 16 April 2019.
26. Recital 37 of the Directive on whistleblowers.
27. Recitals 39 and 40 of the Directive on whistleblowers. In favour of a broad personal scope, see V. Junod, "Lancer l'alerte: quoi de neuf depuis *Guja*?...", *o.c.*, p. 479.

9. The Directive distinguishes three categories of persons who deserve at least the benefit of protection.[28]

Firstly, the protection should apply to persons having the status of "workers" within the meaning of Article 45, 1. of the Treaty on the Functioning of the European Union (TFEU) as interpreted by the Court of Justice, that is to say "persons who, for a certain period of time, perform services for and under the direction of another person, in return for which they receive remuneration".[29] Protection should also be granted to workers in non-standard employment relationships, such as part-time workers, fixed-term workers and temporary agency workers, as well as to civil servants, public service employees and any person working in the public sector.

Secondly, protection should also apply to natural persons who, without being "workers" within the meaning of Article 45, 1. of the TFEU, "can play a key role in exposing breaches of Union Law and may find themselves in a position of economic vulnerability in the context of their work-related activities".[30] This includes self-employed workers within the meaning of Article 49 of the TFEU[31], self-employed employees, consultants, contractors, sub-contractors and suppliers[32], but also shareholders and persons in managerial bodies, including non-executive members[33], as well as employees whose employment relationship has been terminated or has not yet begun in cases where they acquire information on breaches during the recruitment process or another pre-contractual negotiation stage.[34]

Thirdly and finally, protection should also apply to persons who are not in a situation of economic vulnerability, but who may nevertheless suffer retaliation for reporting breaches. This is the case for volunteers and paid or unpaid trainees.[35]

10. In theory, one might think that the Directive on whistleblowers should not apply to workers who act under a legal duty to report.[36] Indeed, whistleblowing is necessarily an activity carried out freely, with no legal obligation.[37] In Europe, whistleblowing activity is not a career choice.[38] It does not fall within the function of the whistleblower to blow the whistle and he or she is not subject to any particular duty of vigilance.[39] Reporting is conceived, in our legal system, as being freely engaged in principle, the duty to report being an exception.[40]

Despite this, the Directive should grant protection "where Union or national law requires the reporting persons to report to the competent national authorities, for instance as part of their job duties and responsibilities or because the breach is a criminal offence".[41] The Directive then acts as a "safety net" in the event that Union or national law does not accompany the mandatory reporting with appropriate safeguards.

If scholars are concerned at seeing the number of legal reporting duties grow[42], especially in the security and financial context combined with the development of digital technologies[43], it should be noted that the movement is currently under control in Belgium, thanks in particular to the wisdom of the Constitutional Court.[44]

b) Relatives, facilitators and legal entities with which reporting persons are connected

11. In November 2018, the European Parliament suggested amending the proposal for a directive in order to extend the scope of protection, where appropriate, to "facilitators".[45] The amendment was retained in the final text of the direc-

28. Art. 4 of the Directive on whistleblowers.
29. Art. 4, 1., (a) of the Directive on whistleblowers read in the light of Recital 38 of the aforesaid Directive.
30. Recital 39 of Directive on whistleblowers.
31. Art. 4, 1., (b) of the Directive on whistleblowers.
32. Art. 4, 1., (d) of the Directive on whistleblowers. The extension is perfectly justified in practice. For example, Edward Snowden, whose status as a whistleblower is unanimously recognized in Europe, was indeed a subcontractor of the NSA. He did not therefore work directly for the NSA. In particular, he worked for *Dell* and *Booz Allen Hamilton*, two NSA service providers.
33. Art. 4, 1., (c) of the Directive on whistleblowers.
34. Art. 4, 2. and 3. of the Directive on whistleblowers.
35. Recital 40 of the Directive on whistleblowers.
36. It should be noted that such duties form, as a rule, an "order of the law" within the meaning of Art. 458 of the Criminal Code and thus an exception to professional secrecy. See A. Masset and E. Jacques, "Secret professionnel", *Postal Mémorialis S 30* 2012, No. 115, p. 13-15.
37. The whistleblower acts, by definition, "freely and conscientiously" (Conseil d'Etat français, *Le droit d'alerte: signaler, traiter, protéger*, study adopted on 25 February 2016 by the Plenary General Assembly of the *Conseil d'Etat*, La Documentation française, 2016, p. 56).
38. In support of this, it should be noted that the term "potential whistleblower" is used extensively in the recitals of the Directive on whistleblowers. It follows that any "worker" is likely at some point to blow a whistle, but that this activity is not usual.
39. With this in mind, see O. Leclerc, *Protéger les lanceurs d'alerte. La démocratie technique à l'épreuve de la loi*, Issy-les-Moulineaux, LGDJ, 2017, p. 20-21.
40. Where the law provides for a duty to report, it must be limited to certain specific facts whose seriousness justifies the establishment of a legal obligation. The history of reporting has indeed shown that the introduction of a generalized mandatory reporting is dangerous. On the subject, see A. Lachapelle, *La dénonciation à l'ère des lanceurs d'alerte fiscale: de la complaisance à la vigilance*, Bruxelles, Larcier, 2021, à paraître.
41. Recital 62 of the Directive on whistleblowers.
42. For more on this, see Y. Poullet, "Titre 1 – Numérique et droit – La vertu du clair-obscur" in Y. Poullet (dir.), *Vie privée, liberté d'expression et démocratie dans la société numérique*, Bruxelles, Larcier, 2020, p. 47-46.
43. They may include in particular the obligation to report "cross-border tax arrangements" under the "DAC 6" and the obligation to report "suspicions of money laundering" under the Fourth Directive "AML".
44. The Constitutional Court thus annulled, by judgment No. 44/2019 of 14 March 2019, Art. 46*bis*/1, paragraph 3, of the Code of Criminal Investigation, inserted by an Act of 17 May 2017, which required members of staff of social security institutions to *spontaneously* report to the Public Prosecutor "information that may constitute serious indications of a terrorist offence". Since Art. 46*bis*/1 of the Code of Criminal Investigation refers to a "declaration in accordance with Art. 29", it should be noted, however, that this was not, strictly speaking, an "order of the law" within the meaning of Art. 458 of the Criminal Code, but a "legal authorization". The duty to report passively, i.e. at the request of the Public Prosecutor, laid down in the same article, on the other hand, was endorsed with regard to the right to privacy.
45. Report on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (COM(2018)0218 – C8-0159/2018 – 2018/0106(COD)), Committee on Legal Affairs, A8-0398/2018, 26 November 2018.

tive. A "facilitator" is defined as "a natural person who assists a reporting person in the reporting process in a work-related context, and whose assistance should be confidential".[46]

The protection also applies, where appropriate, to "third persons who are connected with the reporting persons and who could suffer retaliation in a work-related context, such as colleagues or relatives of the reporting persons; and legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context".[47]

12. It is regrettable that the text does not specify whether the protection of these whistleblowers by extension will be conditioned by the recognition of the status of "reporting person" to the person they have helped, which may represent a serious source of legal insecurity.

Moreover, it is not clear how the "facilitator" differs from "colleagues or relatives of the reporting persons". The legislative work does not clarify the notion of facilitator. It may be thought that the difference between the two categories lies in the actual assistance provided to the reporting person. The facilitator, as the name suggests, *actively* facilitates the action of the whistleblower. This is the case of a colleague or relative who assists him or her in the theft of data, in the use of the stolen data or in finding a contact person who is able to investigate. It is also the case of the staff representative or trade union representative who informs the whistleblower about the applicable legal framework and advises him or her on how to proceed.[48] Conversely, the mere "third person" in relation to the whistleblower does not actively participate in the reporting. However, the third person may be subject to retaliatory measures only through a knock-on effect, in his or her capacity as a close associate of the whistleblower.

13. The protection of legal entities was included neither in the Commission proposal of 23 April 2018 nor in the Parliament's legislative proposal of 26 November 2018. It also contrasts with Recommendation CM/Rec(2014)7 which expressly limits the protection of whistleblowers to natural persons, thus excluding the nagging problem of damage to the reputation of organizations directly or indirectly targeted in the reporting.

2. *Exclusion of "private citizens"*

14. Although this has apparently been envisaged in the tax field, the Directive does not cover reporting in the area of private life.[49] It is limited to the work-related context as this alone justifies the establishment of specific protection.

It is agreed that this type of reporting, namely the reporting to the tax authorities of a neighbor suspected of cheating on his income tax, does not constitute "whistleblowing" *stricto sensu*.[50] Also, it must be agreed that History has shown us that reporting by a private individual rarely expresses the fulfillment of a civic duty. Reporting here is similar to "snitching", in that it targets a close relative who is troublesome: a (former) husband, a neighbor, a colleague or a competitor.[51]

15. Nevertheless, reporting by a private citizen is legally recognized in the majority of the Member States of the European Union. The social reaction against crime is largely organized around reporting.[52] Moreover, it should be noted that "tax whistleblowing", as it is practiced today on the other side of the Atlantic, does not take into account the position of the whistleblower. Whistleblowing can be carried out by individuals as well as by workers. In the United States, the *IRS Whistleblower Act* applies to "individuals who report to the IRS on violations of tax laws by others". The whistleblower is therefore not necessarily a "worker". The *IRS Whistleblower Program* goes beyond whistleblowing *sensu stricto* and applies to different types of cases: most commonly to the reporting of non-organizational wrongdoing; occasionally to the reporting of organizational misconduct, either by an insider ("*whistleblowing*") or by an outsider ("*bell-ringing*").[53] The same can be said about the *Offshore Tax Informant Program* in Canada.[54] Tax reform in Australia also appears to be moving towards a broad definition of "tax whistleblower".[55]

46. Art. 5, (8) of the Directive on whistleblowers.
47. Art. 4, 4. of the Directive on whistleblowers.
48. With this in mind, see Recital 41 of the Directive on whistleblowers which stresses that trade union representatives or employees' representatives should enjoy the protection provided for under the Directive both where they report in their capacity as workers and where they have provided advice and support to the reporting person.
49. The working paper stated that "Any potential initiative at EU level would broadly aim to ensure an overall effective level of protection for whistleblowers across the EU, either horizontally or on a sector-specific basis. The aim would be to encourage individuals to report, without fear of retaliation, threats or harm to the public interest which they have come across in the field of their work or *even private life*" (our emphasis) (European Commission, Platform for Tax Good Governance, The Commission's Initiative on Protecting Whistleblowers, DOC: Platform/28/2017/EN, p. 2-3, available at www.ec.europa.eu/taxation_customs/sites/taxation/files/platfrom_wistlebolowers.docx.pdf (accessed February 19, 2018)).
50. M.P. Miceli, S. Dreyfus and J.P. Near, "Outsider 'whistleblowers': Conceptualizing and distinguishing 'bell-ringing' behavior" in D. Lewis, A.J. Brown *et al.* (eds.), *International Handbook on Whistleblowing Research* Cheltenham, Elgar, 2014, p. 76. In this regard, authors refer to the literature of psychosocial sociology, in particular *bystander intervention*.
51. See P. Betbeder, "Dénoncer à Paris durant la Seconde Guerre mondiale" in J.-P. Brodeur and F. Jobard (dirs.), *Citoyens et délateurs. La délation peut-elle être civique?*, Paris, Autrement, 2005, p. 78.
52. S. Brahy, "Dénonciation officielle et dénonciation civique", mercuriale prononcée le 1er septembre 1978 à l'audience solennelle de la cour d'appel de Liège, *RDPC*, 1978, p. 947.
53. M.P. Miceli, S. Dreyfus and J.P. Near, *o.c.*, p. 87.
54. See K. Sadiq, "Tax and Whistle-Blower Protection: Part of a Commitment to Tackling Tax Misconduct in Australia", *Intertax* 2018, Vol. 46, Iss. 5, p. 431.
55. See K. Sadiq, *o.c.*, p. 432.

It should be noted that reporting by private individuals accounts for a large proportion of tax fraud reporting to the tax authorities in Belgium. For lack of a legal framework, any one of the 27,000 civil servants employed by the tax authorities may receive a report.[56] No distinction is made according to whether the report comes from a worker or not.

For this reason, it can be argued that tax compliance requires the protection of all "reporting persons" who communicate in good faith with the tax authorities, whether or not such individuals are acting within the framework of a work-related context.[57]

16. In the light of these considerations, it seems useful to examine, in the context of the transposition of the Directive, the relevance of excluding reporting by a private citizen from the scope of the (future) tax whistleblowing system.

In this respect, it should be pointed out that the Belgian draft bill "*Panama Papers*", now obsolete, defined a tax reporting person as a natural person who reports certain facts committed by a legal person to the tax authorities.[58] The "tax whistleblower" was therefore not necessarily acting in the context of a professional relationship. What mattered was the status of the exposed taxpayer and thus also the stakes of the facts reported: in this case, the status of legal persons and especially of private companies.

3. *Exclusion of "bounty hunters"*

17. The text amended by Parliament in November 2018, like the proposal for a directive of 23 April 2018, totally ignored the issue of bounty awarding. However, reward programs are well known in practice, particularly in the criminal field and in the field of customs and excise.

It is therefore to be welcomed that the Directive on whistleblowers finally raises the issue, even if it immediately dismissed it, stating that it "should not apply to cases in which persons who, having given their informed consent, have been identified as informants or registered as such in databases managed by authorities appointed at national level, such as customs authorities, and report breaches to enforcement authorities, in return for reward or compensation".[59] Such reports are made in accordance with "specific procedures that aim to guarantee the anonymity of such persons in order to protect their physical integrity, and that are distinct from the reporting channels provided for under this Directive".[60]

What should we deduce from this? Is the clause to be interpreted as if European Law distinguishes between two autonomous systems of reporting: the system of reporting with rewards, on the one hand, and the system of reporting without rewards, on the other? May or should the whistleblower choose: either to be protected or to be paid?

The issue is currently not settled in Belgium. Recommendation No. 26 of the "*Panama Papers*" Commission notes that a distinction could indeed be made between "tax whistleblowers" and "tax informers" in that it suggests that the protection of the whistleblower could depend on the circumstance that he or she has acted "in a selfless manner, in the general interest".[61] In this regard, the Belgian lawmaker could then provide for two separate tax reporting regimes depending on whether a reward program is provided for or not.

A careful reading of the Directive reveals, however, that the prospect of a reward is not the only criterion to be taken into account as such. But the demarcation line is not very clear-cut. What about a reporting person who receives a reward but is not registered in a public database? What about a reporting person who is registered in a public database, but without having given informed consent to be so? What about a reporting person who receives a reward from a private person?[62] Should such informants, who clearly act with the expectation of a reward, still enjoy protection under the Directive?

18. Why so much suspicion towards rewards programs? It should be remembered that reporting for financial gain is conventionally akin to snitching[63], with even greater force in the European legal tradition.[64] Heir to the republican conception of civic reporting, the figure of the whistleblower

56. See R. Rosoux, "Les dénonciations au fisc: quelques réflexions sur les points de vue administratif et judiciaire belges et les pratiques dans deux pays limitrophes"", *RGCF* 2018, No. 2, p. 136. See also in the media S. Buron, "Ils vous dénoncent au fisc", *Trends.levif.be*, 13 June 2013 (accessed November 3, 2019).

57. See A.P. Dourado, "Whistle-Blowers in Tax Matters: Not Public Enemies", *Intertax* 2018, Vol. 46, Iss. 5, p. 424.

58. On this draft, see C. Dillen and V. Vercauteren, "De Panama Papers-slinger slaat volledig door. Sancties voor wie controle belemmert, en vergoeding voor klokkenluiders"", *Fisc.Act*. 2018, No. 34, p. 1-5.

59. Recital 30 of the Directive on whistleblowers.

60. Recital 30 *in fine* of the Directive on whistleblowers.

61. Report "Les Panama Papers et la fraude fiscale internationale" made on behalf of the special commission "Fraude fiscale international / Panama Papers" by R. Van de Velde, V. Scourneau, B. Dispa and P. Vanvelhove, *Doc.*, Chambre, 2017-2018, No. 54-2749/002.

62. If the report has not been made public, the reward may have been granted by the company whose actions are being questioned: the company may have an interest, as part of its risk management policy, in granting a reward to whistleblowers who report to it. An example of this is the "Data Abuse Bounty Program" set up by *Facebook* in the wake of the "*Cambridge Analytica Files*" (available at www.facebook.com/data-abuse (accessed April 10, 2020). If the report has been made public, the reward could have been granted by a competitor: the latter could find an interest in discrediting the image of an opponent through the revelation of a public scandal.

63. E.S. Callahan and T. M. Dworkin, "Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act", *Villanova Law Review* 1992, Vol. 37, Iss. 2, Art. 2, p. 318-336.

64. About the virtues of not acting to make financial gain and selflessness in French, see A. Desrameaux, "La dénonciation fiscale en France et aux Etats-Unis: un enjeu républicain", *REIDF* 2018, No. 1, p. 67; J.-F. Kerleo, "Qu'est-ce qu'un lanceur d'alerte? Classification et conceptualisation d'une catégorie juridique insaisissable" in M. Disant and D. Pollet-Panoussis (dirs.), *Les lanceurs d'alerte. Quelle protection juridique? Quelles limites?*, Issy-les-Moulineaux, Lextenso, 2017, p. 20.

by contrast conveys three main ideas.[65] Not acting to make financial gain (the whistleblower does not act in return for a reward), selflessness (the whistleblower acts on behalf public interest and not out of personal interest) and spontaneity (the whistleblower does not act on the request of the authorities).

This republican thinking seems to have provided food for thought for the European Court of Human Rights, which has consistently affirmed that "an act motivated by a personal grievance or a personal antagonism or the *expectation of personal advantage, including pecuniary gain*, would not justify a particularly strong level of protection".[66] Despite everything, the High Court recognizes that the whistleblower may simultaneously pursue personal interests, such as the desire to improve his working conditions, as long as he or she is primarily acting in the public interest.[67]

B. Material Scope

19. Drawing on the work of the Council of Europe[68], the Directive on whistleblowers applies to the reporting of confidential information concerning practices that constitute an infringement or threat to the public interest.[69] It does not, however, aim to protect the reporting of any infringement or threat to the public interest, but only of misconduct that is considered as such by the European lawmaker.

Although the application of the Directive in tax matters may have given rise to some reservations, it is now accepted that the Directive applies in the tax area to tax breaches relating to the internal market as referred to in Article 26, 2. TFEU (1.). Nevertheless, the Directive does not harmonize tax law provisions, either in substantive or procedural law.[70] It is in this clause that the agreement reached between Parliament and the Council on the tax whistleblowing is based. The Directive on whistleblowers also applies incidentally to breaches of European Union rules in the sector of financial services, products and markets and the prevention of money laundering and terrorist financing (2.). On the other hand, the disclosure of alleged "irresponsible" or "unfair" tax practices is not covered by the Directive (3.).

1. *Breaches relating to the internal market*

20. The Directive on whistleblowers aims first and foremost to prevent and combat breaches and arrangements which "can give rise to unfair tax competition and extensive tax evasion, distorting the level playing field for businesses and resulting in a loss of tax revenues for Member States and for the Union budget as a whole".[71]

For this reason, the Directive applies only to the following tax breaches:

- breaches relating to the internal market in relation to acts which breach the rules of corporate tax (tax evasion);
- breaches relating to the internal market in relation to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law (tax avoidance);
- breaches relating to the internal market including breaches of Union competition and State aid rules.

21. The first category of tax breaches relates to tax evasion. According to the doctrinal definition traditionally accepted in Belgium, "tax fraud" presupposes the combination of two constituent elements: a "material" element, i.e. an alteration of reality, and a "moral" element, i.e. the intention to avoid, or reduce, the tax burden finally due.[72] Tax evasion is said to be "simple" when the alteration of reality happens downstream in the return to the tax authorities, taking the form of a "*concealment*" of taxable income.[73,74] Concealment is, for example, the fact of not declaring certain taxable income in one's tax return. By contrast, tax evasion is "complex" when the alteration of reality occurs upstream, in the annual accounts kept by the taxpayer or in the legal transactions that they presented and which influence the definition of the taxable object and/or the determination of the tax base. The term "complex" is used in that it is aggravated by forgery.[75] The alteration of the reality that takes place vis-à-vis the tax authorities in the legal actions taken by the taxpayer comes under what is called, in the law of obligations, "*simulation*".[76] Simulation is, for example, the act of giving the ap-

65. V. Martin, "La révolution française ou l''ère du soupçon'", *Hypothèses* 2009, No. 1, p. 133.
66. Our emphasis. See ECHR (gr. ch.) 12 February 2008, *Guja / Moldova*, § 77; ECHR (5th sect.) 21 July 2011, *Heinisch / Germany*, § 69; ECHR (3thsect.), 8 January 2013, *Bucur and Toma / Romania*, § 93; ECHR (2nd sect.) 19 January 2016, *Görmüs and others / Turkey*, § 50.
67. See ECHR, *Heinisch*, § 83.
68. According to the Recommendation CM/Rec(2014)7, "whistleblowing" or more exactly "public interest report or disclosure" means "the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest".
69. For a general review of the material scope, see A. Lachapelle, "L'encadrement juridique de la dénonciation par un lanceur d'alerte au sein de l'Union européenne: commentaire de la directive sur les lanceurs d'alerte", *RDTI* 2019, No. 4, in press.
70. Recital 18 of the Directive on whistleblowers.
71. Recital 18 of the Directive on whistleblowers.
72. See J. Kirkpatrick and D. Garabedian, *Le régime fiscal des sociétés en Belgique*, 3th ed., Bruxelles, Bruylant, 2003, p. 55; L. Mehl, *Science et technique fiscales*, Tome II, p. 733 cité *in* Th. Delahaye, *Le choix de la voie la moins imposée. Etude de droit fiscal comparé (Belgique – France – Pays-Bas – Royaume-Uni)*, Bruxelles, Bruylant, 1977, p. 24. See also M. Moris, *Procédure fiscale approfondie en matière d'impôts directs*, Limal, Anthemis, 2014, p. 98-99.
73. Art. 449 of the Belgian Income Tax Code of 1992. Hereinafter: BITC. See Fr. Loeckx and R. Van Dionant, *Eléments de la science des impôts*, Tome I, 4th ed., Bruxelles, Ministère des Finances – Administration des contributions directes, 1980, p. 163-164; Th. Delahaye, *o.c.*, p. 24.
74. Fr. Loeckx and R. Van Dionant, *o.c.*, p. 163-164; Th. Delahaye, *o.c.*, p. 24.
75. Art. 450 of the BITC. See A. Nollet, "Contours et alentours de la notion de 'simulation' en droit fiscal, 50 ans après 'Brepols'" in M. Bourgeois and I. Richelle (dirs.), *En quête de fiscalité et autres propos...Mélanges offerts à Jean-Pierre Bours*, Bruxelles, Larcier, 2011, p. 128.
76. About "simulation" in Tax Law, see A. Nollet, *o.c.*, p. 125-161.

pearance of not being the owner of a legal entity while benefiting from the income generated by this entity.

The second category of tax breaches concerns tax avoidance. The lawmaker has realized that it cannot identify, "once and for all", tax law wrongdoing because it evolves according to the skill and ingenuity of taxpayers and their advisors. While it could detail and punish newly emerging tax misconduct, the chase would be endless.[77] Recourse to the legal standard must therefore be complemented by open-textured principles. This is the reason why general (GAARs) and specific (SAARs) "anti-avoidance rules" are emerging. Filed under Article 344 of the Belgian Income Tax Code of 1992 (hereinafter: BITC), the Belgian notion of tax avoidance/abusive practice is inspired by the caselaw of the Court of Justice of the European Union and the general anti-avoidance rule formulated in Article 6 of the "ATAD" Directive.[78]

Finally, the third category concerns breaches relating to the internal market itself. Certain tax arrangements may indeed be sanctioned under internal market rules if they lead to market distortions. This is the case, for example, of advance tax rulings which can be sanctioned on the basis of the rules against preferential tax regimes or on the basis of State aid rules.

The *media leaks* should be used to illustrate these three categories of breach. The practices exposed in the context of the "*Swiss Leaks*", which aimed at circumventing the application of the "Savings Directive", for example, are likely to fall into the first category, while the tax arrangements revealed in the context of the "*Panama Papers*" are likely to fall into the second category. Finally, the rulings at the heart of the "*Lux Leaks*" potentially fall into the third category in that the rulings may be sanctioned either under the rules on preferential tax regimes or under the rules on State aid.

22. In light of the right to respect for private life, it may be asked whether it would not be justified to exclude from the scope of the tax whistleblowing system tax facts which already have to be brought to the attention of the tax authorities by virtue of specific mandatory reporting – notably the obligation to report "cross-border tax arrangements" under the sixth amendment of the Directive No. 2011/16/UE on Administrative Cooperation in the field of taxation (DAC 6).[79]

The obligation of *active* reporting (i.e. spontaneous) should concern "interference by a public authority" with the right to respect for private life enshrined by Article 22 of the Constitution and Article 8 of the European Convention on Human Rights (hereinafter: ECHR).[80] It follows that such an obligation must be "prescribed by law", in accordance with one or more legitimate aims and must be "necessary in a democratic society" for the achievement of those aims.

It seems to us that the test of necessity is more difficult to meet if the reporting of the facts covered by the mandatory reporting is already encouraged and legally protected. In fact, it is a guarantee that a tax whistleblower will transmit to the tax authorities information that companies[81], financial institutions[82] or intermediaries[83] are already supposed to have transmitted to the tax authorities.[84]

In addition, there is a risk that this situation will lead to a bottleneck for the tax authorities, while the effectiveness of the DACs has not even been assessed yet.

23. At the same time, opening tax whistleblowing to these tax facts ensures that they are indeed reported to the public bodies.[85] The tax scandals which have erupted since the economic crisis of 2008 have shown that one cannot rely exclusively on companies, financial institutions and tax intermediaries. These categories of people are the most qualified to expose tax wrongdoings of which they are aware, but they are not necessarily the most willing to react[86], either because they themselves benefit from tax wrongdoings, or because they are immersed in a culture of secrecy hardly conducive to the disclosure of information, or because they fear retaliation if they speak out (demotion, loss of promotion, suspension...).

Unless the material scope of tax whistleblowing is better specified – which is precisely what the Belgian law should do – it then seems risky to expect a whistleblower, who is not, in principle, a specialist, to determine whether the facts he or she is planning to report are already subject to a reporting obligation.[87]

Furthermore, it should be admitted that excluding from the

77. D. Gutmann, "Chapter 6. France" in K.B. Brown (ed.), *A Comparative Look at Regulation of Corporate Tax Avoidance Ius Gentium*, Comparative Perspectives on Law and Justice 12, London-New York, Springer-Dordrecht Heidelberg, 2012, p. 135.
78. About "tax abuse", see spec. Nollet A., *De l'"abus fiscal" ou Quand des actes juridiques du contribuable sont inopposables au fisc pour l'établissement de l'impôt. Essai de cadre théorique et critique en droit fiscal belge*, Bruxelles, Larcier, 2019. See also Th. Afschrift, *L'abus fiscal*, Bruxelles, Larcier, 2013.
79. With this in mind but on the basis of other grounds (that is the complexity of Tax Law), see A.P. Dourado, "Whistle-Blowers in Tax Matters...", *o.c.*, p. 424-425; K. Pantazatou, "The New Directive on Whistleblowers' Protection: Any Impact on Taxation?"", *Kluwer International Tax Blog*, 22 May 2019 (accessed May 22, 2019).
80. In judgment No. 14/2019, the Belgian Constitutional Court has expressly recognized that the obligation of *passive* reporting (i.e. upon request) established by Art. 46*bis*/1 of the Criminal Investigation Code amounted to an "interference by a public authority with the right to respect for private life. Such interference will constitute a breach of Art. 22 of the Constitution and Art. 8 of the ECHR unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" for the achievement of those aims.
81. Under "DAC 4" (transfer pricing documentation).
82. Under "DAC 2" (financial account information – Common Reporting Standard).
83. Under "DAC 6" (cross-border tax arrangements).
84. K. Pantazatou, "The New Directive on Whistleblowers' Protection...", *o.c.*
85. With this in mind, see K. Pantazatou, "The New Directive on Whistleblowers' Protection...", *o.c.*
86. With this in mind, see "Evasion fiscale: qui consent à l'impôt, qui n'y consent pas?" (M. Renahy's statements) in *5e Salon du livre de lanceuses et lanceurs d'alerte. Des livres et l'alerte*, organized by *Le Presse Papier* and a group of volunteers, Montreuil, 22, 23 and 24 november 2019.
87. A.P. Dourado, "Whistle-Blowers in Tax Matters...", *o.c.*, p. 424.

scope of tax whistleblowing the facts for which a duty to report already exists for a professional would render the Directive on whistleblowers almost meaningless from a tax point of view.

24. What the scholars seem to agree on is that the tax whistleblower should, at least, be protected as long as he or she is able to show that he or she had reasonable grounds to believe that the facts reported constituted tax evasion.[88] Tax evasion is by definition illegal.
In any event, the Directive on whistleblowers considers the whistleblower to be acting in good faith if he or she had "reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of [the] Directive".[89] The whistleblower will therefore be protected even if it turns out that the facts reported did not, in reality, represent evasive and/or abusive arrangements within the meaning of the Directive.

2. *Tax breaches covered by sector-specific Union acts*

25. The Directive on whistleblowers also applies to breaches in the sector of "financial services, products and markets, and prevention of money laundering and terrorist financing".[90]
These breaches may be of interest to the tax authorities in two cases.
Firstly, there are the breaches that relate to suspicions of money laundering linked to a "tax crime". Such breaches can already be reported under the reporting mechanism set up under the Fourth and Fifth Anti-Money Laundering (AML) Directives.[91] As a reminder, "tax evasion" may be considered as "tax crime" when it involves particularly large amounts, involves the manufacture or use of forgeries and/or involves complex mechanisms or procedures with an international dimension.[92]
Secondly there are the breaches that relate to "tax special schemes". Such breaches can already be reported under the reporting mechanisms implemented as a follow-up to the Solvency II and Banking Directives.[93] A unique feature of Belgian law, the notion of "special schemes which have the purpose or effect of encouraging tax evasion by third parties" ("*bijzondere mechanismen met als doel of gevolg fiscale fraude te bevorderen*" in Dutch; "*mécanismes particuliers ayant pour but ou pour effet de favoriser la fraude fiscale*" in French) is not the subject of a legal definition in law. However, financial institutions do have guidance from the *Financial Services and Markets Authority* (FSMA)'s predecessor, the *Commission bancaire et financière (CBF)*.[94] These include, for example, intermediation for a foreign credit institution or a foreign investment firm promoting tax evasion by residents.

26. In accordance with the principle of subsidiarity, the Directive on whistleblowers merely complements the sector-specific Union acts, so as to harmonize upwards the minimum standards of protection, while retaining specific features linked to the regulated sectors, in this case financial.[95]

3. *Exclusion of "irresponsible and unfair tax practices"*

27. The major tax scandals which precipitated the adoption of the Directive on whistleblowers not only shed light on illegal and abusive tax facts, but also on tax facts considered contrary to the principles of tax justice and/or Corporate Social Responsibility.
The statements of the Minister of Finance about the "*Paradise Papers*", which followed closely the "*Panama Papers*", speak for themselves: "La fraude et l'évasion fiscale soulèvent à juste titre une vive indignation. Les citoyens et les entreprises ne supportent plus que certains privilégiés continuent d'avoir recours à des subterfuges pour frauder ou éluder l'impôt. Je partage leur indignation. Des révélations telles que les *Paradise Papers* sont toutefois peu surprenantes, car il est souvent question de constructions dans les paradis fiscaux qui remontent à une époque où ces pratiques étaient courantes. Entre-temps, l'opinion a changé à cet égard. De telles pratiques portent en effet préjudice à la justice fiscale et à la crédibilité des entreprises et des entités concernées."[96]

28. Nonetheless, the Directive on whistleblowers completely ignores this view, closing the door to any such reporting by

88. A.P. Dourado, *o.c.*, p. 424. See also D. Gutmann, "The Difficulty in Establishing...", *o.c.*, p. 427.
89. Art. 6, 1., (a) and Recital 32 of the Directive on whistleblowers.
90. Art. 2, 1., (a), (ii) of the Directive on whistleblowers.
91. On those reporting channels, see *infra* paragraph 32.
92. Draft Act of 22 April 2013 "portant des dispositions urgentes en matière de lutte contre la fraude, *exposé des motifs* et commentaire des articles", *Doc.*, Chambre, 2012-2013, No. 53-2763/001, p. 4-5. On the notion of "tax crime", see J. Spreutels, "Blanchiment et fraude fiscale grave et organisée", *Colloque "Face à la criminalité organisée en matière fiscale"*, Palais des Congrès, Bruxelles, 2001, p. 5-6, available at www.ctif-cfi.be (accessed November 1st, 2019); J.-F. Godbille, "Analyse du malaise lié à la poursuite de la petite fraude fiscale: face à la fraude fiscale simple, la fraude fiscale grave" *in Liber Amicorum Maurice Eloy*, Limal, Antemis, 2014, p. 89-130.
93. For a complete overview of internal and external whistleblowing channels in the financial sector, see S. Cools, "Klokkenluiden bij de FSMA en de National Bank", *RPS-TRV* 2018, liv. 7, p. 656-678.
94. Circular D1 97/9 of the CBF to credit institutions of 18 December 1997; Circular D4 97/4 of the CBF to investment firms of 18 December 1997; both available at www.nbb.be (accessed November 3, 2019).
95. Art. 3, 1. of the Directive on whistleblowers. In this regard, Recital 20 of the Directive on whistleblowers states that the Directive should complement sector-specific acts so that they are fully aligned with minimum standards. See also Recitals 23 and 110 of the Directive.
96. Answer given to A. Laaouej, *C.R.I.*, Chambre, 2015-2016, meeting of 4 October 2016, No. 54-COM/501, p. 17.

strictly defining the material scope of tax whistleblowing. Even if failure to pay one's "fair share of taxes" undoubtedly damages the European Union's financial interests, this type of behavior cannot fall within the material scope of the Directive via the category of "breaches affecting the financial interests of the Union as referred to in Article 325 TFEU".[97] Indeed, the Directive specifies that this category of breach concerns breaches "as further specified in relevant Union measures".

In the current state of law, irresponsible and unfair tax practices therefore fall outside the scope of the Directive on whistleblowers. The reporting of such practices continues to fall solely within the scope of Corporate Social Responsibility (through corporate whistleblowing)[98] and the right to freedom of expression (through public disclosure).[99] Member States are, however, free to extend the application of national provisions on whistleblowing to acts and areas other than those covered by the Directive.[100]

II. The Establishment of Reporting Channels

29. The Directive on whistleblowers requires private and public entities to establish, within their own *governance structure*, internal reporting channels, sometimes called "*whistleblowing hotlines*".[101]

Whistleblowing hotlines, while fully integrated into traditional governance mechanisms, are, as a rule, a *complementary* mechanism alongside the other usual control and reporting mechanisms (employee representatives, reporting line, audit, inspection service, etc.).[102]

30. The Directive on whistleblowers lay down the establishment of reporting channels as regards both internal reporting (A.) and external reporting (B.). The obligations to establish such channels should build as far as possible on the existing channels provided by specific Union acts, such as market abuse, namely Regulation (EU) No. 596/2014 and Implementing Directive (EU) No. 2015/2392.[103] In addition, the Directive explicitly addresses the issue of public disclosure, in particular to the media (C.), which represents a major step forward compared to the initial text proposed by the Commission.

A. *Internal Reporting*

31. According to Article 8 of the Directive, Member States shall ensure that legal entities as listed in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law. The following "legal entities" are covered by the Directive:

- legal entities in the private sector with 50 or more workers[104];
- entities – without threshold – falling within the scope of Union acts referred to in the Annex of the Directive[105];
- all legal entities in the public sector, including any entity owned or controlled by such entities, with the understanding that Member States may exempt from the obligation municipalities with fewer than 10,000 inhabitants or fewer than 50 workers, or other public entities with fewer than 50 workers.[106]

The notion of "private legal entity" has not been defined. The term is confusing. Is the concept of private entity reserved for *legal* persons or does it also include *natural* persons who carry out sustainable economic activities? In this case, should the notion of private entity be brought closer to that of "enterprise", as defined in general in the Code of Economic Law[107]? The notion of "public entity" also brings its share of difficulties. Is an "independent administrative authority" a public entity within the meaning

97. Art. 2, 1., (b) of the Directive on whistleblowers.

98. On the CSR movement in tax matters, see D. Gutmann, "Chapitre 6. France" in K.B. Brown (ed.), *A Comparative Look at Regulation of Corporate Tax Avoidance*, *o.c.*, p. 131-148; A. Pirlot, "Les interactions entre la fiscalité et la responsabilité soci(ét)ale des entreprises – Au-delà de la planification fiscale, la fiscalité environnementale comme lieu d'expression de la R.S.E.?", *Ann.dr.* 2014, liv. 3, p. 377-394.

99. On public disclosure in tax matters, see L. Johnson, "Whistleblowing and investigative journalism: reputational damage and the private governance of agressive tax planning" in R. Eccleston and A. Elbra (eds.), *Business, Civil Society and the "New" Politics of Corporate Tax Justice. Paying a Fair Share*, Cheltenham-Northampton, Edward Elgar Publishing, 2018, p. 269-291.

100. Art. 2, 2. of the Directive on whistleblowers.

101. On the "Structural Model", see T.M. Dworkin and A.J. Brown, "The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws", *Seattle Journal for Social Justice* , Vol. 11, Iss. 2, Art. 8, p. 679. See also A. Lachapelle, "Le lancement d'alerte ou la délation organisée?" in Y. Poullet (dir.), *Vie privée, liberté d'expression et démocratie dans la société numérique*, Bruxelles, Larcier, 2020, p. 213-215.

102. In this regard, see N. Smaili, "Le *whistleblowing*: la solution en gouvernance?" in S. Rousseau (dir.), *Gouvernance, risques et crise financière*, Montréal, Thémis, 2013, p. 240; B. Fasterling, "Whistleblower protection: A comparative law perspective" in D. Lewis, A.J. Brown *et al.* (eds.), *International Handbook on Whistleblowing Research* Cheltenham, Elgar, 2014, p. 345; M. Lauvaux, V. Simon and D. Stas de Richelle, *Criminalité du travail: détecter et contrôler les comportements frauduleux. Sanctions et responsabilité du travailleur*, Etudes pratiques de droit social, Waterloo, Kluwer, 2007, p. 129.

103. Recital 68 of the Directive on whistleblowers.

104. Following an appropriate risk assessment, Member States may require legal entities in the private sector with fewer than 50 workers to establish internal reporting channels and follow-up procedures (art. 8, 7. and Recital 49 of the Directive on whistleblowers). Moreover "it should be clear that, in the case of legal entities in the private sector that do not provide for internal reporting channels, reporting persons should be able to report externally to the competent authorities and such persons should enjoy the protection against retaliation provided by [the] Directive" (Recital 51 of the Directive on whistleblowers).

105. This includes private entities operating in the sector of financial services, products and markets, and prevention of money laundering and terrorist financing.

106. Art. 8, 9. of the Directive on whistleblowers.

107. Unless otherwise specified, for the application of the Code of Economic Law, "enterprise" refers to any natural person who pursues a professional activity in a self-employed capacity, any legal person governed by private law, any legal person governed by public law which offers goods and services on a market and any organization without legal personality which pursues the aim of distribution (art. I.1).

of the Directive? What about schools? Is a primary school subject to the obligation? What about a university?

32. It is up to each individual legal entity in the private and public sector to define the kind of reporting channels to be established. As long as the confidentiality of the identity of the whistleblower is ensured, flexibility is required. The report can be made in writing, by post, by mail, by physical complaint box(es), or through an online platform (intranet or internet platform), or orally, by telephone hotline or other voice messaging system and even during a physical meeting.[108]

In any case, the procedures for internal reporting and for follow-up shall include the following safeguards and requirements:

1) secure and confidential reporting channels[109];
2) acknowledgment of receipt of the report to the reporting person within seven days of that receipt and "feedback" within a reasonable time frame about the "follow-up"[110]

   "Follow-up" shall mean "any action taken by the recipient of a report or any competent authority, to assess the accuracy of the allegations made in the report and, where relevant, to address the breach reported, including through actions such as an internal enquiry, an investigation, prosecution, an action for recovery of funds, or the closure of the procedure".[111]

   "Feedback" shall mean in turn "the provision to the reporting person of information on the action envisaged or taken as follow-up and on the grounds for such follow-up"[112];.
3) the designation of an impartial person or department competent to receive and follow up on reports[113].

   The choice of the most appropriate persons or departments depends on the structure of the entity. In smaller entities, "this function could be a dual function held by a company officer well placed to report directly to the organizational head, such as a chief compliance or human resources officer, an integrity officer, a legal or privacy officer, a chief financial officer, a chief audit executive or a member of the board".[114] The "Whistleblower Officer" therefore appears as a new figure in compliance management, alongside the Data Protection Officer and the Compliance Officer.[115]

   Third parties may be authorized to receive reports of breaches on behalf of public or private entities, provided they offer appropriate safeguards.[116] The Directive on whistleblowers draws particular attention to the fact that they must offer appropriate guarantees of respect for independence, confidentiality, data protection and secrecy.[117] Such third parties could be external reporting platform providers, external counsel, auditors, trade union representatives or employees' representatives[118];
4) diligent follow-up by the designated person or department and, where provided for in national law, as regards anonymous reporting[119].

   Like the Council of Europe[120], the European Union regards diligent follow-up as a crucial tool "for building trust in the effectiveness of the overall system of whistleblower protection and reduces the likelihood of further unnecessary reports or public disclosures"[121];
5) appropriate information relating to the use of internal reporting channels[122]and external reporting channels.[123]

Such information should be clear and easily accessible to workers but also – in view of the broad interpretation given to the notion of "reporting person" – to persons other than workers, to any extent possible, who come in contact with the entity through their work-related activities, such as service-providers, distributors, suppliers and business partners.[124]

Information could be posted at a visible location accessible to all such persons and on the website of the entity, and could also be included in courses and training seminars on ethics and integrity.

108. Art. 9, 2. and Recital 53 of the Directive on whistleblowers.
109. Art. 9, 1., (a) of the Directive on whistleblowers.
110. Art. 9, 1., (b) and (f) of the Directive on whistleblowers.
111. Art. 5, (12) of the Directive on whistleblowers.
112. Art. 5, (13) of the Directive on whistleblowers.
113. Art. 9, 1., (c) of the Directive on whistleblowers.
114. Recital 56 of the Directive on whistleblowers.
115. See A. Lachapelle, "Le lancement d'alerte (*whistleblowing*) à l'ère du règlement général sur la protection des données" in C. de Terwangne and K. Rosier (dirs.), *Le règlement général sur la protection des données (RGPD/GDPR). Analyse approfondie*, Bruxelles, Larcier, 2018, p. 828; J. Terstegge, "EU Watch: Data protection and the new face of privacy compliance", *Business Compliance* 2013, No. 6, p. 40.
116. Art. 8, 5. of the Directive on whistleblowers.
117. Recital 54 of the Directive on whistleblowers.
118. For example, BDO has already been providing a "whistleblowing service" for over a year. For a monthly fee, this service includes the creation of a secure platform (anonymous, if appropriate), raising staff awareness, report's managing, communicating to a designated authority within the company and defining a clear whistleblowing policy. The brochure "Whistleblowing as a service" (in French) is available at: www.bdo.be/getattachment/Nieuws/2019/Eerste-Belgische-meldpunt-voor-bedrijfsfraude/2019_03_Fiche-Whistleblowing-FR_dig-(2).pdf.aspx?lang=fr-BE (accessed May 25, 2020).
119. Art. 9, 1., (d) and (e) of the Directive on whistleblowers.
120. Recommendation CM/Rec (2014)7, Appendix to the Recommendation, Section VI, Principle 20 (internal reporting) and Explanatory Memorandum, Appendix – The 29 principles, point 77 (external reporting).
121. Recitals 57 and 67 of the Directive on whistleblowers.
122. Art. 7, 3. of the Directive on whistleblowers.
123. Art. 9, 1., (g) of the Directive on whistleblowers.
124. Recital 59 of the Directive on whistleblowers.

33. As noted above[125], Belgium law already has two internal reporting mechanisms with an impact on the tax field. The first concerns special tax schemes and the second concerns suspicions of money laundering.

The establishment of adequate internal reporting channels for breaches of standards and codes of conduct of financial institutions has been mandatory since the adoption of the Banking Act[126], which transposes Directive No. 2013/36/EU[127], into Belgian law, and the Solvency II Act[128], which transposes Directive No. 2009/138/EC[129] into Belgian law. But it was already advocated since 2007 by the FSMA's predecessor, the *Commission bancaire, financière et des assurances* (CBFA).[130] The prohibition to set up "special schemes which have the purpose or effect of encouraging tax evasion by third parties" occupies an important place among the regulations applicable to financial institutions. In this case, the report of breach should in all likelihood to be made to the Compliance Officer.[131]

The Act of 18 September 2017 on the Prevention of Money Laundering and the Financing of Terrorism and on the Restriction of the Use of Cash[132], which transposes the Fourth AML Directive into Belgian law[133], also requires the setting up of an internal reporting mechanism in order to strengthen law enforcement. According to Article 10 of this Act, the reporting entities must define and implement "appropriate procedures proportionate to their nature and size" in order to enable members of their staff or their agents or distributors to report offences relating to the prevention of money laundering and terrorist financing (ML/TF) to the effective board or to the AML Compliance Officer "through a specific, independent and anonymous channel".

Outside the tax scope of the Directive on whistleblowers, it should be highlighted that a company could perfectly well decide to set up an internal reporting mechanism as part of its Corporate Social Responsibility policy. Organizations will soon be able to help themselves in this context with the "ISO/NP 37002 Whistleblowing management systems". The implementation of an internal reporting mechanism is increasingly being promoted as a tool for minimizing risks[134], including tax risks.[135]

B. *External Reporting*

34. According to Article 11 of the Directive on whistleblowers, Member States shall designate the authorities competent to receive, give feedback and follow up on reports, and shall provide them with adequate resources.

The notion of "competent authority" is broad. They could be judicial authorities, regulatory or supervisory bodies competent in the specific areas concerned, or authorities of a more general competence at a central level within a Member State, law enforcement agencies, anticorruption bodies or ombudsmen.[136]

Effective enforcement of external reporting channels requires that any authority which has received a report, but does not have the competence to address it, should transmit it to the competent authority, within a reasonable time, in a secure manner, taking care to inform the reporting person, without delay, of such a transmission.[137]

35. In Belgium, there are varied competent authorities in the area of taxation. At least five different authorities are likely to become aware, through a report, of "tax facts".

The first competent authority is, of course, the tax authorities. At present, however, there is no central contact point for receiving and dealing with tax reports, so that any of the 27,000 civil servants employed by the tax authorities can receive a report[138], including inspectors from the *Special Tax Inspectorate* (STI).[139]

If the breaches reported consist of criminal tax law offences

125. See *supra* paragraph 24.
126. Art. 21, § 1, 8° of the Act of 25 April 2014 "relative au statut et au contrôle des établissements de crédit et des sociétés de bourse" (*M.B.*, 7 May 2014).
127. Art. 71 of the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (*OJEU*, L. 176, 27 June 2013).
128. Act of 13 March 2016 "relative au statut et au contrôle des entreprises d'assurance ou de reassurance" (*M.B.*, 23 March 2016).
129. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (*OJEU*, L. 335, 17 December 2009).
130. Circular PPB-2007-6-CPB-CPA of 30 March 2007 "relative aux attentes prudentielles de la CBFA en matière de bonne gouvernance des établissements financiers", pts. 65-69, available at www.nbb.be (accessed November 1st, 2019).
131. About the function of a "*Compliance Officer*", see among others G. de Foy and E. Ceci, "Le compliance officer bancaire: pierre angulaire du commerce des indulgences étatiques en Belgique?", *Revue de planification patrimoniale belge et internationale* 2018, No. 4, p. 305-318.
132. Act of 18 September 2017 "relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces" (*M.B.*, 6 October 2017).
133. It should be noticed that the Fifth Directive AML doesn't change this obligation significantly.
134. As reformed in 2020, the Belgian Code on Corporate Governance includes whistleblowing ("specific arrangements for raising concerns") among the internal control and risk management systems (Principle 4.13).
135. The ratings agency *RobecoSAM*, which calculates *Dow Jones Sustainability Index (DJSI)*, has thus added the criterion of tax strategy in the Corporate Sustainability Assessment. See R. Seer, "Purpose and Problems of Tax Transparency – the legal perspective" in *Tax Transparency – EATLP Annual Congress Zürich 7-9 June 2018*, EATLP International Tax Series, Vol. 17, Amsterdam, IBFD, oral presentation; C. Schelling, "Tax Transparency and Automatization – The Perspective of the Tax Administration" in *Tax Transparency – EATLP Annual Congress Zürich 7-9 June 2018, EATLP International Tax Series*, Vol. 17, Amsterdam, IBFD, oral statement; E. Laville/ Utopies, "La responsabilité fiscale, nouvelle frontière de la responsabilité sociale?", Note de position #3, November 2014, p. 2.
136. Recital 64 of the Directive on whistleblowers.
137. Art. 11, 6. of the Directive on whistleblowers. See also Art. 12, 3. of the aforesaid Directive.
138. See R. Rosoux, *o.c.*, p. 136.
139. "Bijzondere Belastinginspectie" in Dutch and "Inspection spéciale des impôts (ISI)" in French.

(simple or complex tax evasion), the whistleblower may also contact the Public Prosecutor. If the whistleblower is a public official, this is an obligation under Article 29 of the Code of Criminal Investigation ("official" information).[140] If the whistleblower is a private-sector worker or a private individual, this is only an option, since Article 30 of the Code of Criminal Investigation does not cover taxation ("civic" information).[141]

If the breaches reported reveal a money laundering crime connected to a "tax crime" or an offence relating to "special schemes which have the purpose or effect of encouraging tax evasion", the whistleblower, whether or not he or she is an employee of a financial institution, may contact the National Bank of Belgium (NBB).[142] The NBB has set up an online procedure under which any person can report any infringement of the legislation which it monitors.[143]

If the whistleblower is a member of the staff of a private entity certified or registered with the NBB or the FSMA and subject to the supervision of the latter[144], he or she may also report the above-mentioned breaches – special schemes and suspicions of money laundering – to the FSMA.[145] Pursuant to Article 69*bis*, § 1, 1st subparagraph of the Act of 2 August 2002 on the supervision of the financial sector and on financial services, as amended by Article 13 of the Act of 31 July 2017, the FSMA has effectively put in place effective online mechanisms to enable the reporting of any potential or actual infringement of the financial legislation with which the FSMA supervises compliance.[146]

Finally, any person could in theory report suspicions of money laundering connected to a "tax crime" to the *Belgian Financial Intelligence Processing Unit* (CTIF-CFI) as long as this authority is the authority empowered in Belgium to receive suspicious transaction reports from institutions and professions covered by AML regulations. Nonetheless, the CTIF has currently not set up an express mechanism to receive reports from tax whistleblowers about money laundering of "tax crime". During his hearing before the Parliamentary Commission "*Panama Papers*", the President of the CTIF also stated that he is reluctant to receive reports from persons who are not legally obliged to report.

36. The procedures for external reporting and for follow-up have some common features with the procedures for internal reporting and for follow-up.[147]

As in the case of internal reporting channels, there is a strong focus on flexibility regarding the forms of the report. It may be in writing or orally, by telephone or any other voice mail system, and even in a face-to-face meeting.[148] The qualities expected of external reporting channels are nevertheless more rigorous.[149] In compliance with European data protection rules, the obligation to provide information is also strengthened. Competent authorities must explicitly publish on their websites in a separate, easily identifiable and accessible section at least eight pieces of information.[150]

C. *Public Disclosure*

37. Unlike the proposal for a Directive of 23 April 2018, the Directive on whistleblowers contains an express provision on public disclosure: Article 15. The absence of an express provision in the proposed directive had indeed been criticized by the non-profit sector. Reporting persons shall qualify for protection against retaliation whatever the channels of reporting, including public disclosure.[151] Additional conditions must, however, be met, as we will see.

The Directive underlines that "protection of whistleblowers as journalistic sources is crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies".[152] With the tax scandals of recent years, the *International Consortium of Investigative Journalists* (ICIJ) has proven to be a trusted recipient for whistleblowers. The ICIJ is a non-profit organization based in Washington D.C. It is a global network of journalists and media organizations working together to investigate high-profile cases with a transnational dimension.[153]

140. However, failure to comply with this obligation is not expressly sanctioned so that it is generally seen as a natural obligation.
141. About information in criminal matters, see S. Brahy, "Dénonciation officielle et dénonciation civique", mercuriale prononcée le 1er septembre 1978 à l'audience solennelle de la cour d'appel de Liège, *RDPC* 1978, p. 947-968.
142. Indeed, the NBB must report to the judicial authorities "mécanismes particuliers mis en place pour favoriser la fraude fiscale par des tiers, lorsqu'elle a connaissance du fait que ces mécanismes particuliers constituent, pour l'institution même – en tant qu'auteur, coauteur ou complice –, une infraction fiscale passible de sanctions pénales" (art. 36/4 of the Act of 22 February 1998 "fixant le statut organique de la Banque nationale de Belgique" (*M.B.*, 28 March 1998)).
143. Home >Supervision financière > Généralités > Signaler une infraction, available at www.nbb.be (accessed October 15, 2018). See also Art. 36/7/1 of the Act of 22 February 1998.
144. Art. 25 and 45 of the Act of 2 August 2002 "relative à la surveillance du secteur financier et aux services financiers" (*M.B.*, 4 September 2002).
145. Report "Les *Panama Papers* et la fraude fiscale internationale" made on behalf of the special commission "Fraude fiscale internationale/Panama Papers" by R. Van de Velde, V. Scourneau, B. Dispa and P. Vanvelhove, Annex 3 – Rapport des auditions et contexte général – by M. Bourgeois and M. Delanote (note closed on January 10, 2017), *Doc.*, Chambre, 2017-2018, No. 54-2749/002, p. 143.
146. P. de Pauw and A. Mechelynck, "Les lanceurs d'alerte dans le secteur financier", *Financieel Forum/Bank- en financieel recht* 2018, No. 1, p. 55. See also the FSMA website available at www.fsma.be/en/faq/whistleblowers-point-contact (accessed May 21, 2020).
147. Art. 11, 2. of the Directive on whistleblowers.
148. Art. 12, 2. of the Directive on whistleblowers.
149. On the qualities expected of external reporting channels, see A. Lachapelle, "L'encadrement juridique de la dénonciation par un lanceur d'alerte au sein de l'Union européenne...", *o.c.*
150. Art. 13 of the Directive on whistleblowers. See also Recital 75 of the aforesaid Directive.
151. Recital 45 of the Directive on whistleblowers.
152. Recital 46 of the Directive on whistleblowers.
153. Five Belgian journalists are members of the ICIJ: Kristof Clerix (*Knack*), Alain Lallemand (*Le Soir*), Lars Bove (*De Tijd*), Xavier Counasse (*Le Soir*) and Joël Matriche (*Le Soir*).

Public disclosure to the media is not, however, exhaustively dealt with in the procedure established by the Directive. The Directive on whistleblowers "shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information".[154] The Directive does not therefore harmonize the issue of public disclosure to the media, but merely recognizes its legitimacy with regard to the phenomenon of whistleblowing.

38. In tax matters, the prevarication around Public Country-by-Country Reporting (PCbCR)[155] shows that the public disclosure of tax data, even when it does not relate to reprehensible practices, does not yet enjoy a consensus within the Member States. It must be acknowledged that the *media leaks* have certainly provoked major advances in the fight against tax fraud and evasion – in particular with the adoption of the G20/OECD BEPS Plan and the revision of the DAC – but have above all, perhaps wrongly, put the spotlight on the alleged "morality" of the behavior of some taxpayers rather than on the loopholes in the (international) tax system.

III. The Protection of Whistleblowers

39. The Directive on whistleblowers lays down common minimum standards for the protection of persons reporting and, where relevant, of facilitators, third persons who are connected with the reporting persons and of legal entities that the reporting persons own, work for or are otherwise connected with in a work-related context[156] (B.).

The *Platform on Tax Good Governance*, which was consulted in the context of the drafting of the Directive, had indeed stressed that the existence of disparate legislation on the protection of tax whistleblowers affects the "level-playing field"[157] within the internal market, which can threaten competition as well as the financial interests of the Member States and the European Union. This is especially true in the multinationals, where some of whose subsidiaries may be established in Member States with a framework of protection while others may be located in Member States which do not.[158]

40. The protection under the Directive is not absolute: it is subject to two conditions both inspired by our legal tradition. The first relates to the "good faith" of the whistleblower. The second is linked to the respect of the "chain of command" (A.).

A. Conditions for Protection of whistleblowers

41. Reporting persons shall qualify for protection provided that they had "reasonable grounds" to believe that the breaches reported were true and covered by the Directive at the time of reporting (1.) and they reported in compliance with the reporting channels (2.).

1. Reasonable belief of the whistleblower

42. If there is one constant throughout History, it is that the reporting person who acts in "good faith" is the only reporting person who deserves protection. The Directive on whistleblowers is no exception to this rule. However, under pressure from civil society, especially the NGO *Transparency International-France*, the European lawmaker has swapped the formal criterion of "good faith" for the more objective criterion of "reasonable belief".[159] Such a conception of "good faith" also coincides with that defended in Recommendation CM/Rec(2014)7[160] and in the *UK Public Interest Disclosure Act (PIDA) 1998*[161], from which the Directive is inspired.

According to Article 6 of the Directive, whistleblowers thus benefit from the specific protection provided that "they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive". It follows that protection should not be withheld where the reporting person reported inaccurate information on breaches by honest mistake. In the same vein, reporting persons should be entitled to protection under the Directive

154. Art. 15, 2.of the Directive on whistleblowers.
155. Proposal for a Directive of the European Parliament and of the Council amending Directive No. 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches, COM (2016) 198 final, 12 April 2016.
156. Given the framework of this paper, we have focused on the protection of the whistleblowers. However, it should be noted that the European approach to whistleblowing is characterized by a strong focus on the protection of the "person concerned", i.e. "a natural or legal person who is referred to in the report or public disclosure as a person to whom the breach is attributed or with whom that person is associated" (art. 5, (10) of the Directive on whistleblowers).
157. The "*level playing field*" refers to the establishing of a level playing field in the tax field within the internal market, but also outside the Union's borders (see Report "Les *Panama Papers* et la fraude fiscale internationale" made on behalf of the special commission "Fraude fiscale internationale/Panama Papers" by R. Van de Velde, V. Scourneau, B. Dispa and Vanvelhove, Annex 3 – Rapport des auditions et contexte general – by M. Bourgeois and M. Delanote (note closed on January 10, 2017), *Doc.*, Chambre, 2017-2018, No. 54-2749/002, p. 42).
158. European Commission, Platform for Tax Good Governance, The Commission's Initiative on Protecting Whistleblowers, Doc.: Platform/28/2017/EN, *o.c.*, p. 2.
159. The expression "bonne foi" appears only twice in the Recitals of the French version of the Directive (Recitals 9 and 32), while the expression "good faith" has completely disappeared from the English version of the Directive, replaced, where appropriate, by the expression "honest mistake".
160. Recommendation CM/Rec(2014)7, Explanatory memorandum, Appendix – The 29 principles, point 85.
161. Section 43B of the ERA 1996. PIDA should be consulted on the UK Government's website: www.legislation.gov.uk/ukpga/1998/23/contents (accessed July 4, 2019).

if they have reasonable grounds to believe that the information reported falls within its scope.[162]
As we already noticed, the second clarification is particularly important in the tax field. Given the complexity of Tax Law, it can be particularly difficult for a lay person, and sometimes even for a tax lawyer, to say whether or not a conduct violates a tax provision. It might seem inappropriate "to require that a whistle-blower 'classify' an act as tax evasion or tax fraud. The precise legal classification of particular conduct can be required only by the tax authorities and courts, also because a whistle-blower may not have access to all relevant data".[163]

43. While the European Court of Human Rights has held that "an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection"[164], the Directive on whistleblowers states that "the motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection".[165] Such a clause was proposed by the European Parliament in November 2018 and maintained in the text of the directive.[166] Increasingly, it is argued that what matters when assessing the protection of the whistleblower is not the motivation of the whistleblower, but "the relevance and usefulness of the information reported to the organization concerned, the competent authorities or the public".[167]
On the other hand, it is important to continue to deter further malicious reporting and preserve the credibility of the system.[168] The Directive thus states that Member States "shall provide for effective, proportionate and dissuasive penalties applicable in respect of reporting persons where it is established that they knowingly reported or publicly disclosed false information. Member States shall also provide for measures for compensating damage resulting from such reporting or public disclosures in accordance with national law".[169]
False reporting is already punishable under Belgian law through the offences of libel and slander (art. 443 of the Criminal Code), false accusation (art. 445 of the Criminal Code) and insult (art. 448 of the Criminal Code).[170] The application of these criminal provisions in the tax field is, however, very theoretical in that reporting, even if malicious, is lawful as long as it is in the public interest.

44. After some hesitation, there is no doubt that the fact that the reporting is anonymous should not be an impediment to the protection under the Directive. Anonymous reports have occurred, are occurring and will continue to occur. Moreover, as stated in the Directive, there already exist obligations to provide for anonymous reporting by virtue of Union Law.[171]
The European lawmaker thus leaves Member States free to decide whether legal entities in the private or public sector and competent authorities are required to accept and follow up on anonymous reports of breaches.[172] But, in any event, persons who anonymously reported or who made anonymous public disclosures falling within the scope of the Directive and meet its conditions should enjoy protection under the Directive if they are subsequently identified and suffer retaliation.[173]

2. *Compliance with reporting channels*

45. In its first version, the Directive on whistleblowers required compliance with a "*tiered-level reporting procedure*". Nonetheless, the appropriateness of such a procedure gave rise to contrasting responses from the stakeholders ques-

162. Recital 32 of the Directive on whistleblowers.
163. A P. Dourado, "Whistle-Blowers in Tax Matters: Not Public Enemies", *o.c.*, p. 424. In this regard, see also D. Gutmann, "The Difficulty in Establishing...", *o.c.*, p. 427.
164. Voy. ECHR (gr. ch.) 12 February 2008, *Guja / Moldavia*, § 77; ECHR (5th sect.) 21 July 2011, *Heinisch / Germany*, § 69; ECHR (3th sect.) 8 January 2013, *Bucur and Toma / Romania*, § 93; ECHR (2nd sect.) 19 January 2016, *Görmüs and others / Turkey*, § 50; ECHR 13 May 1992, decision *Haseldine / the United Kingdom*. The motive behind the actions of the reporting employee is a central criterion in the Court's review since it may lead to deny the benefit of "whistleblower" status. For an example, see ECHR (5th sect.) 13 January 2015, *Rubins / Latvia*, § 87; ECHR (5th sect.) 17 September 2015, *Langner / Germany*, § 46; ECHR (5th sect.) 12 October 2010, decision *Bathellier / France*, p. 7; ECHR (5th sect.) 30 September 2010, decision *Balenovic / Croatia*, p. 28.
165. Recital 32 *in fine* of the Directive on whistleblowers.
166. Recital 64*bis* of the Draft European Parliament Legislative Resolution of 26 November 2018. In this regard, see also the European Parliament resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI)), point 47.
167. Recital 64*bis* of the Draft European Parliament Legislative Resolution of 26 November 2018. In favour of such approach, see the Report "Promotion and protection of the right to freedom of opinion and expression" by the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression, David Kaye, 2015, Note by the Secretary-General, General Assembly of the United Nations, A/70/361, 8 September 2015, p. 16; F. Chaltiel Terral, *Les lanceurs d'alerte*, Paris, Dalloz, 2018, p. 49. *Contra*: see V. Bouhier, "Lanceurs d'alerte", *JDE* 2017, No. 243, p. 349.
168. Recital 102 of the Directive on whistleblowers.
169. Art. 23, 2. of the Directive on whistleblowers. These sanctions may include criminal, civil or administrative penalties (Recital 102 of the aforesaid Directive).
170. About those offenses, see P. Lambert, "Dénonciation calomnieuse" *inPostal Mémorialis. Lexique du droit pénal et des lois spéciales*, octobre 2018, D 70, p. 4-29; P. Lambert, "Calomnie" in *Postal Memorialis. Lexique du droit pénal et des lois spéciales*, C 40, Waterloo, Kluwer, 1er décembre 2008, p. 1-21; P. Lambert, "Diffamation" *in Postal Memorialis. Lexique du droit pénal et des lois spéciales*, D 130, Waterloo, Kluwer, 1er décembre 2008, p. 1-19; A. Lorent, "Atteintes portées à l'honneur ou à la considération des personnes", *RDPC* 2005, p. 99-119; A. Lorent, "Atteintes portées à l'honneur ou à la considération des personnes" in P. Chome, A. Lorent, F. Roggen and J.-P. Collin, *Droit pénal et procédure pénale*, Suppl. 10, Waterloo, Kluwer, 2005, p. 9-123; P. Magnien, "Chapitre XIV. Les atteintes portées à l'honneur et à la considération des personnes. Section 2. La dénonciation calomnieuse à l'autorité" in M.-A. Beernaert, H.-D. Bosly, C. Clesse *et al.*), *Les infractions*, Vol. 2, *Les infractions contre les personnes*, Bruxelles, Larcier, 2010, p. 748- 809.
171. See for instance Art. 61, 3. of the Fourth Directive AML about internal reporting.
172. Art. 6, 2. of the Directive on whistleblowers. See also Recital 34 of the aforementioned Directive.
173. Art. 6, 3. of the Directive on whistleblowers. See also Recital 34 of the aforementioned Directive.

tioned in the frame of the public consultations.[174] It had even provoked an outcry from media organizations and non-governmental organizations.[175]

In the field of taxation, in particular, the experts were somewhat skeptical considering that only reports brought to the attention of the tax authorities should be protected. As an exception, *CFE Tax Advisers Europe*, for its part, was in favor of a "tiered-level reporting procedure" on the grounds that such a procedure guarantees the interests of all the stakeholders and even of the society at large. *CFE Tax Advisers Europe* recognizes "that there may be limited circumstances when whistleblower protection may need to be extended to persons who do not make an internal disclosure as a first step".[176] But it stresses that the whistleblowers must first make an internal disclosure, where applicable. This is often the case since internal reporting is a standard practice in audit and consulting firms.[177]

46. Following in the footsteps of the Committee of Ministers of the Council of Europe[178], the European lawmaker has corrected the situation, removing any idea of a "level" between the three reporting channels. From now on, the reporting person has the right to "choose the most appropriate reporting channel depending on the individual circumstances of the case".[179] However, if he or she wants to qualify for protection under the Directive, he or she is still required to report – internally, externally or publicly – in accordance with the procedure laid down in the Directive.[180]

In practice, internal reporting still continues to be the most usual and secure way. As a general rule[181], it is the best way to produce an early and effective reaction. Compliance with the tiered-level reporting procedure can also to be used to demonstrate the good faith of the whistleblower.[182] In fact, both the employer and the whistleblower benefit from the implementation of internal reporting channels. The employer avoids the risk of damage to his or her reputation[183]; the whistleblower limits the risk of work-related retaliation since he or she cannot be accused of breaching a duty of confidentiality or loyalty.[184]

In the light of these considerations, the Directive calls on Member States to "encourage reporting through internal reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation".[185] It should be underlined that this principle applies regardless of whether the reporting channels have been set up under European or national law.[186]

47. While the Directive on whistleblowers praises internal reporting, it recognizes at the same time that such a mechanism is not always appropriate.

Indeed, there may be instances where no internal reporting channels have been provided, or the internal channels provided are in practice deficient or cannot reasonably be expected to function properly. There are also cases where Union or national law itself requires the reporting persons to report to the competent national authorities.[187] This is the case when a public official becomes aware of a crime in the course of his or her duties or when an auditor becomes aware of breaches of financial legislation in his or her company.

The Directive should grant protection in all those instances.

48. When the reporting is public, the Directive on whistleblowers provides for additional requirements. The reporting person shall qualify for protection under the Directive in two circumstances[188]:

– either that the whistleblower first reported internally and externally, or directly externally in accordance with the Directive, but no appropriate action was taken in

174. Proposal for a directive of 23 April 2018, Annex 2, p. 68-69.

175. See Q. Van Enis, *Robust whistleblower protection is a crucial challenge for the European democracy*, European Federation of Journalists, 2018, available at www.europeanjournalists.org (accessed November 3, 2019); XNET – EDRi (European Digital Rights), "Analysis and recommendations for key modifications in the draft EC Directive for the Protection of Whistleblowers", 12 June 2018, available at www.xnet-x.net/en/recommendations-modifications-draft-ec-directive-protection-whistle-blowers/ (accessed June 25, 2018); T. Devine, "Response to proposed EU Directive on protecting whistleblowers", WIN (Whistleblowing International Network) EU MEMORANDUM 1: 19 June 2018, available at www.whistlenetwork.files.wordpress.com/2018/10/win-memo-1-legal-assessment-of-eu-proposed-wb-directive-19-06-18.pdf (accessed December 20, 2018).

176. CFE Tax Advisers Europe, *Opinion Statement PAC 4/2018 on the European Commission proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law ("Whistleblowing")*, issued by the CFE Professional Affairs Committee, submitted to the European Institutions in July 2018, p. 2-3, available at www.taxadviserseurope.org (accessed October 5, 2019).

177. Since 2017, PwC has been promoting a culture of transparency through its *Code of Conduct*, in which everyone should feel free to express their concerns internally. There are many different reporting channels. PwC is also committed to protecting from retaliation people who express internal concerns about wrongdoing. Reporting to public bodies and public disclosure to the media, however, are not addressed in the public documents available on the PwC's Website. See PwC, *Living our Purpose and Values PwC's Code of Conduct*, May 2017, available at www.pwc.com (accessed October 5, 2019).

178. Recital 61 of the Draft European Parliament legislative resolution of 26 November 2018.

179. Recital 33 of the Directive on whistleblowers.

180. Art. 7 (internal reporting), Art. 10 (external reporting) and Art. 15 (public disclosure) of the Directive on whistleblowers.

181. Art. 7, 1. of the Directive on whistleblowers.

182. In this regard, see ECHR, *Heinisch*, § 86; ECHR, *Bucur*, § 117.

183. In this regard, see A. Hümeyra Çakir, M. Betül Gökçe and L. Bin, "Whistleblowing: Ethical or not", *Delft University of Technology Project Management EPA 1412*, p. 3, available at www.academia.eu (accessed March 27, 2018).

184. For more on this, see V. Junod, "Lancer l'alerte: quoi de neuf depuis *Guja*? (Cour eur. dr. h., *Bucur et Toma c. Roumanie*, 8 janvier 2013)", *RTDH* 2014, No. 98, p. 476.

185. Art. 7, 2. of the Directive on whistleblowers

186. Recital 47 of the Directive on whistleblowers.

187. Recital 62 of the Directive on whistleblowers.

188. Art. 15, 1. of the Directive on whistleblowers.

response to the report[189] within a reasonable timeframe as referred in the Directive[190];
– or the whistleblower had reasonable grounds to believe that the breach could constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage, including harm to a person's physical integrity[191] or, in the case of external reporting, that there is a risk of retaliation or lack of diligent follow up.[192]

In any event, public disclosure arises as a "safety valve" to report a systemic problem that involves both an organization, private or public, and an emanation of the public authority.[193]

B. *Common minimum standards for the protection of whistleblowers*

49. Whilst the confidentiality of the identity of whistleblowers acts, *prima facie*, as a bulwark against retaliations (1.)[194], it is in the prohibition of retaliation (2.) and in the limited exemption from liability (3.) that the specificity of whistleblower protection lies.[195]

1. *Duty of confidentiality*

50. According to Article 16, 1. of the Directive on whistleblowers, the identity of the reporting person should not be disclosed "to anyone beyond the authorized staff members competent to receive or follow up on reports, without the explicit consent of that person". Legal entities in the private and public sector and competent authorities should put in place adequate protection procedures for the protection at all stages of the procedure of the identity of every reporting person, person concerned, and third persons referred to in the report, for example witnesses or colleagues.[196] The identity of the reporting person and any other information from which the identity of the reporting person may be directly or indirectly deduced may be disclosed "only where this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations by national authorities or judicial proceedings, including with a view to safeguarding the rights of defense of the person concerned".[197]

In any event, disclosure of the identity of the reporting person or of any other information from which the identity of the reporting person may be directly or indirectly deduced shall be subject to "appropriate safeguards under the applicable Union and national rules".[198]

51. Legal entities in the private and public sector and competent authorities should also ensure compliance with Regulation (EU) No. 2016/679 of the European Parliament and of the Council (General Data Protection Regulation – GDPR) and with Directive (EU) No. 2016/680 of the European Parliament and of the Council as soon as the reporting channels are based on the processing of personal data wholly or partly by automated means or on the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.[199]

This is almost always the case in a reporting mechanism, *a fortiori* in the digital age where the management of reports almost necessarily involves an automated data processing tool.[200] In this regard, it should be noticed that most of the data of interest to the tax authorities are in fact "personal data". Moreover, tax data are often considered as "sensitive" even if they are not formally considered as such in the sense of the modernised Convention for the protection

189. According to Recital 79 of the Directive on whistleblowers, "the appropriateness of the follow-up should be assessed according to objective criteria, linked to the obligation of the competent authorities to assess the accuracy of the allegations and to put an end to any possible breach of Union law. The appropriateness of the follow-up will thus depend on the circumstances of each case and of the nature of the rules that have been breached. In particular, a decision by the authorities that a breach was clearly minor and no further follow-up, other than closure of the procedure, was required could constitute appropriate follow-up pursuant to [the] Directive".

190. In the case of internal reporting, feedback should be provided to the reporting person within a reasonable timeframe "not exceeding 3 months from the acknowledgment of receipt or, if no acknowledgement was sent to the reporting person, 3 months from the expiry of the seven-day period after the report was made" (art. 9, 1., (f) of the Directive on whistleblowers). In the case of external reporting, feedback should be provided to the reporting person "within a reasonable timeframe not exceeding 3 months, or 6 months in duly justified cases (art. 11, 2., (d) of the Directive on whistleblowers).

191. Recital 80 of the Directive on whistleblowers.

192. Recital 81 of the Directive on whistleblowers.

193. In this regard, see "Lancement d'alerte. Bilan de l'année et perspectives" (V. Rozière's statements) in *5e Salon du livre de lanceuses et lanceurs d'alerte. Des livres et l'alerte*, organized by *Le Presse Papier* and a group of volunteers, Montreuil, 22, 23 and 24 November 2019.

194. Recital 82 of the Directive on whistleblowers stresses that "safeguarding the confidentiality of the identity of the reporting person during the reporting process and investigations triggered by the report is an essential *ex-ante* measure to prevent retaliation".

195. For the surplus, see A. Lachapelle, "L'encadrement juridique de la dénonciation par un lanceur d'alerte au sein de l'Union européenne...", *o.c.*

196. Recital 76 of the Directive on whistleblowers. Regarding internal reporting, focus is limited to identity of the reporting persons (Recitals 53 and 54 of the Directive on whistleblowers).

197. Art. 16, 2. of the Directive on whistleblowers. In order that the "trade secrets" Directive is effective, the Directive on whistleblowers requires that "the competent authorities that receive information on breaches that includes trade secrets do not use or disclose those trade secrets for purposes going beyond what is necessary for proper follow-up" (art. 16, 4. and Recital 98 of the Directive on whistleblowers).

198. Art. 16, 3. of the Directive on whistleblowers.

199. Art. 17 and Recital 83 of the Directive on whistleblowers. See also Art. 2, 1. of the GDPR.

200. On the requirements derived from the GDPR, see A. Lachapelle, "Le lancement d'alerte (*whistleblowing*) à l'ère du règlement général sur la protection des données" in C. de Terwangne and K. Rosier (dirs.), *Le règlement général sur la protection des données (RGPD/GDPR). Analyse approfondie*, 1st ed., Coll. du CRID, Bruxelles, Larcier, 2018, p. 797-836.

of individuals with regard to the processing of personal data ("Convention 108 +") or the GDPR.[201]

Article 18 of the Directive further lays down the rules applicable to the record-keeping of the reports. Compliance with record-keeping rules is important since information received through reports can be used as evidence in enforcement actions where appropriate.[202]

2. *Prohibition of retaliation*

52. The Directive on whistleblowers lays down the prohibition of retaliation principle against reporting persons and, where appropriate, against facilitators and legal entities with which reporting persons are connected in a work-related context.[203]

Beyond its symbolic impact, a clear legal prohibition of retaliation would have an important dissuasive effect[204], and would be further strengthened by provisions for personal liability and effective, proportionate and dissuasive penalties for the perpetrators of retaliation.[205]

53. The enforcement of European Union Law requires a broad definition of retaliation, "encompassing any act or omission occurring in a work-related context and which causes them detriment".[206]

The Directive covers both measures to end the professional relationship (lay-off, dismissal, early termination, etc.) and disciplinary measures or measures to disqualify the whistleblower professionally (withholding of promotion, transfer of duties, blacklisting, etc.) and privately (psychiatric or medical referrals).[207] It not only prohibits direct retaliation taken by the employer against whistleblowers. It broadly prohibits "any form of retaliation, whether direct or indirect, taken, encouraged or tolerated by their employer or customer or recipient of services and by persons working for or acting on behalf of the latter, including colleagues and managers in the same organization or in other organizations with which the reporting person is in contact in the context of his or her work-related activities".[208] In a culture where those who speak out are still largely disavowed, the employer is indeed not the only individual from whom the whistleblower must fear reprisals. The whistleblower may fear retaliation from co-workers, sometimes diffuse and insidious, for which firm action on the part of the employer is required.

54. Unlike the proposal of 23 April 2018, the Directive dedicates a special article, Article 20, to the support measures available, as appropriate, to the reporting persons.[209] These measures may be provided, as appropriate, by an information center or a single and clearly identified independent administrative authority.[210] In Belgium, this is the "Federal Institute for the Protection and Promotion of Human Rights" created by the Act of 12 May 2019 establishing a Federal Institute for the Protection and Promotion of Human Rights.[211]

At European level, the European Parliament has called on the Commission to set up a body to coordinate Member States' actions, particularly in cross-border situations.[212] The *Network of European Integrity and Whistleblowing Authorities* (NEIWA) was established on 24 May 2019 in The Hague.[213] The Federal Ombudsman is currently a member of this network for Belgium, which operates under the Act of 15 September 2013 on the reporting of a suspected breach of integrity within a federal administrative authority by a member of its staff[214], as amended by the Act of 8 May 2019.[215]

55. Legal prohibition of retaliation is not in itself sufficient to protect the whistleblower.

The reporting person shall have access to remedial measures against retaliation as appropriate, including interim relief pending the resolution of legal proceedings, in accordance with national law.[216] They must, moreover, have access to

201. See A. Lachapelle, "Le respect du droit à la vie privée dans les traitements d'informations à des fins fiscales: état des lieux de la jurisprudence européenne (1re partie)", *RGFCP* 2016, No. 9, p. 24-37; A. Lachapelle, "Le respect du droit à la vie privée dans les traitements d'informations à des fins fiscales: état des lieux de la jurisprudence européenne (2e partie)", *RGFCP* 2016, No. 10, p. 43-64.
202. Recital 86 of the Directive on whistleblowers.
203. Art. 19 of the Directive on whistleblowers, read in the light of its Art. 4, 4.
204. Recital 88 of the Directive on whistleblowers.
205. Art. 23, 1. of the Directive on whistleblowers.
206. Recital 44 of the Directive on whistleblowers.
207. Art. 19 of the Directive on whistleblowers. It should be noted that this non-exhaustive list is more detailed than the list contained in the proposal for a directive of 23 April 2018.
208. Recital 87 of the Directive on whistleblowers.
209. About those measures of support, see A. Lachapelle, "L'encadrement juridique de la dénonciation par un lanceur d'alerte au sein de l'Union européenne...", *o.c.*
210. Art. 20, 3. of the Directive on whistleblowers.
211. Act of 12 May 2019 "portant création d'un Institut fédéral pour la protection et la promotion des droits humains" (*M.B.*, 21 June 2019).
212. European Parliament resolution of 24 October 2017 on legitimate measures to protect whistleblowers acting in the public interest when disclosing the confidential information of companies and public bodies (2016/2224(INI)), point 61.
213. Home < Nieuws < Europees netwerk over integriteit en klokkenluiden, available at www.huisvoorklokkenluiders.nl (accessed on June 22, 2019).
214. Act of 15 September 2013 "relative à la dénonciation d'une atteinte suspectée à l'intégrité au sein d'une autorité administrative fédérale par un membre de son personnel" (*M.B.*, 4 October 2013). For an exhaustive comment of the Act of 15 September 2013, see G. Vande Walle, G. Vynckier and P. De Baets, "Melden en klokkenluiden: weten waar de klepel hangt", *Orde van de dag*, liv. 72, 2015, p. 3-93.
215. Act of 8 May 2019 "modi?ant la loi du 15 septembre 2013 relative à la dénonciation d'une atteinte suspectée à l'intégrité au sein d'une autorité administrative fédérale par un membre de son personnel" (*M.B.*, 17 June 2019).
216. Art. 21, 6. and Recitals 94 and 95 of the Directive on the whistleblowers.

full compensation for the detriment suffered, in accordance with the national legal system, in a way which is proportionate to the detriment suffered and is dissuasive.[217]

In line with Recommendation CM/Rec(2014)7[218], the Directive also establishes a shifting of the burden of proof in proceedings before a court or authority in respect of damage suffered by the whistleblower.[219]

3. *Limited exemption from liability*

56. The core of the whistleblower protection lies in Article 21, 2. of the Directive, which states persons who report information on breaches or make a public disclosure in accordance with the Directive: "shall not be considered to have breached any restriction on disclosure of information and shall *not incur liability of any kind in respect of such a report or public disclosure* provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary for revealing a breach pursuant to [the] Directive" (our emphasis).

It should be emphasized that the scope of immunity differs depending on whether the whistleblower incurs liability by reason of the *reporting or public disclosure* of information on breaches, on the one hand, or by reason of the *acquisition of or the access* to the information which is reported or publicly disclosed, on the other hand.

57. In the first case, the exemption from liability is complete since it covers all forms of liability, whether civil, criminal, administrative or disciplinary. In particular, Article 21, 7. of the Directive provides that reporting persons and persons treated as such (facilitators and legal entities linked to the whistleblower) shall not incur liability of any kind as a result of reports or public disclosures under the Directive: "In legal proceedings, including for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law [...] Those persons shall have the right to rely on that reporting or public disclosure to seek dismissal of the case, provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary for revealing a breach, pursuant to [the] Directive."

If the exemption is complete, it is not complete. It is granted in respect of the reporting or public disclosure under the Directive. In this regard, Article 21, 4. of the Directive provides that: "Any other possible liability of reporting persons arising from acts or omissions which are unrelated to the reporting or public disclosure or which are not necessary for revealing a breach pursuant to this Directive shall continue to be governed by applicable Union or national law."

58. In the second case, the exemption from liability is partial in so far as Article 21, 3. of the Directive states that: "Reporting persons shall not incur liability in respect of the acquisition of or access to the information which is reported or publicly disclosed, *provided that such acquisition or access did not constitute a self-standing criminal offence*. In the event of the acquisition or access constituting a self-standing criminal offence, criminal liability shall continue to be governed by applicable national law." (our emphasis).

This means that the whistleblower enjoys exemption from liability when reporting or disclosing information that he or she has lawfully obtained or had access to. This exemption should also apply when the reporting person reports or discloses information obtained or accessed in breach of civil, administrative or labor law provisions. This is the case, for example, when the whistleblower "acquired the information by accessing the e-mails of a co-worker or files which they normally do not use within the scope of their work, by taking pictures of the premises of the organization or by accessing locations they do not usually have access to".[220]

The whistleblower continues, in contrast, to incur criminal liability under national law when the acquisition or access constitutes a self-standing criminal offence.

59. The solution proposed by this provision risks leading to flagrant inconsistencies from one country to another. Moreover, it is difficult to reconcile with the solution adopted by the Luxembourg Court of Cassation in the "*Lux Leaks*" case.[221] As a reminder, the Luxembourg Court of Cassation ruled that "la reconnaissance du statut de lanceur d'alerte doit s'appliquer en principe à toutes les infractions du chef desquelles une personne, se prévalant de l'exercice de son droit garanti par l'article 10 de la convention, est poursuivie, sous peine de vider la protection devant résulter du statut de lanceur d'alerte de sa substance".[222] It follows that the new "whistleblower's justification" must provide legal immunity for *all the actions* that are part of the disclosure *process* and that have given rise to criminal charges.

If the "*Lux Leaks*" whistleblower, Antoine Deltour, were to be tried under the Directive on whistleblowers, he could probably be prosecuted, notwithstanding his status as a whistleblower, for domestic theft and computer fraud. The fact that he acted in the public interest would be of no

217. Art. 21, 8. and Recital 95 of the Directive on the whistleblowers.
218. Recommendation CM/Rec(2014)7, Appendix to the Recommendation, Section VII, Principle 25 et Explanatory memorandum, Appendix – The 29 Principles, § 88.
219. Recitals 94 and 97 of the Directive on whistleblowers.
220. Recital 92 of the Directive on whistleblowers.
221. For a detailed comment, see E. Cobbaut, "L'encadrement de l'alerte et la protection du lanceur d'alerte (*whistleblower*): l'affaire *Luxleaks* à l'aune d'un cadre européen en construction", *RDTI* 2019, No. 2, p. 47-85.
222. Cour de cassation du Grand-Duché de Luxembourg 11 January 2018, judgment of in the framework of "*LuxLeaks*" case, available in French at www.justice.public.lu (accessed July 2, 2019).

consequence since the two offences mentioned above do not require special intent (*dol spécial*) under Luxembourg law.[223] However, the Luxembourg Court would be free to recognize, in accordance with national law, the whistleblower's justification in such a way as to negate the unlawful nature of domestic theft and computer fraud.

In doing so, it seems to us that Member States that interpret the caselaw of the European Court of Human Rights in the same terms as the Luxembourg Court of Cassation have two options: either they review the criminal offences punishing the acquisition of or access to confidential information in such a way that the offence cannot be established when the perpetrator has acted in the public interest (requirement of special intent); or they let the judge to assess the most appropriate way of accommodating in national law the figure of the whistleblower, as the Luxembourg judge has already done. The first solution is obviously preferable from the point of view of legal certainty, even if the notion of public interest leaves the judge a wide margin of appreciation.

60. A favorable wind to the NGO's criticisms has led to the addition of an express provision in the text of the Directive to regulate the relationship between the Directive on whistleblowers and the "trade secrets" Directive.[224] The two Directives are to be regarded as complementary.[225]

Three hypotheses must be distinguished.

Article 21, 7. of the Directive on whistleblowers explicitly provides that *report or public disclosure of trade secrets on breaches under the Directive* by a reporting person as referred in the Directive is to be considered allowed by Union Law and in that way lawful within the meaning of Article 3, 2. of the "trade secrets" Directive.[226] Whistleblowers "who disclose trade secrets acquired in a work-related context should only benefit from the protection granted by [the Directive on whistleblowers], including in terms of not incurring civil liability, provided that they meet the conditions laid down by [the] Directive, including that the disclosure was necessary to reveal a breach falling within the material scope of [the] Directive".

Unlawful acquisition, use or disclosure of a trade secret which does not fall within the scope of the Directive on whistleblowers, i.e. which do not concern breaches of European Union Law, on the other hand, continue to fall within the scope of the "trade secrets" Directive and, where appropriate, of Article 5.[227] If needed, it should be pointed out that Article 5 of the "trade secrets" Directive provides for the hypotheses – among which is the activity of whistleblowing – in which a civil action brought for breach of trade secret must be dismissed.

The discussion is not closed, however, since the Directive on whistleblowers says nothing about a frequent case – this is our third hypothesis – namely the *acquisition and use of information containing trade secrets falling within the scope of the Directive on whistleblowers* – which would in all likelihood have to take place prior to the reporting or public disclosure – when the breach of trade secrets is a self-standing criminal offence under national law.[228]

On the contrary, we have noticed that the Directive states that "reporting persons shall not incur liability in respect of the acquisition of or access to the information which is reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence".[229] Article 5, b) of the "trade secrets" Directive is not helpful in this regard. Of course, it precludes the application for the measures, procedures and remedies provided for in the "trade secrets" Directive "where the alleged acquisition, use or disclosure of the trade secret was carried out "for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest" but such measures, procedures and remedies concern only *civil* liability actions initiated under the "trade secrets" Directive.[230]

Both Directives – the "trade secrets" Directive and the Directive on whistleblowers – mirror each other, clearly seeking to strike the right balance between the protection of trade secrets and the defense of the public interest. However, it must ultimately be recognized that many grey areas remain.

Conclusion

61. The Directive on whistleblowers is noteworthy. It is indeed the most global instrument to date. Nevertheless, this observation should not obscure the real ambitions of the European lawmaker: the Directive "aims at fully exploiting the potential of whistleblower protection with a view to strengthening enforcement".[231]

223. It should be recalled that Belgian Law differs from Luxembourg Law in that it distinguishes "internal computer fraud" from "external computer fraud". The first is the act of overriding one's authorizations by accessing a computer system with fraudulent intent or with the aim of causing harm (special intent). The second is unauthorized access to or maintenance of a computer system. Here no special intent is required. On the impact of this distinction in the light of the issue of "ethical hackers", see J.-F. Henrotte and P. Limbree, "Le pirate éthique à l'épreuve du droit pénal et de la protection des données", *Legitech*, 2019, p. 20-21.
224. It should be noted that Art. 15, 7. of the proposal for a directive of 23 April 2018 already contained a provision on the subject but it was much less precise.
225. Recital 98 of the Directive on whistleblowers.
226. Art. 3, 2. of the "trade secrets" Directive states that "the acquisition, use or disclosure of a trade secret shall be considered lawful to the extent that such acquisition, use or disclosure is required or allowed by Union or national law".
227. Recital 98 of the Directive on whistleblowers.
228. If the breach of trade secrets is not subject to criminal sanction, it falls within the scope of the Art. 21, 3. of the Directive on whistleblowers, commented above.
229. Art. 21, 3. of the Directive on whistleblowers.
230. See Art. 6, 1. of the "trade secrets" Directive.
231. Proposal for a directive of 23 April 2018, Explanatory memorandum, p. 2.

Such an approach is symptomatic of an "instrumental" conception of whistleblowing[232] in that reporting is "instrumentalized" by the power to which it is addressed in order to guarantee the execution of the policies adopted by the latter. The reporting person acts as a *subject* of the power in place, whether private or public. This "instrumental" conception of whistleblowing can be contrasted with the "democratic" conception of whistleblowing. Closely linked to the human rights movement, this conception began to emerge at the end of the French Revolution and took off, from the 1970s, on both sides of the Atlantic. In its "democratic" sense, reporting, and in particular whistleblowing, is seen as an extension of freedom of expression. The reporting person is no longer considered as a faithful and loyal subject who has pledged allegiance to power, or at least from whom a certain patriotism is expected, but as a citizen who acts freely and in conscience in the name of an interest that goes beyond him or her: the public interest.

This is obvious in tax matters. While the tax scandals of recent years, which have significantly accelerated the adoption of minimum standards of protection for whistleblowers, highlight above all the loopholes of the tax system and the alleged lack of "tax citizenship" of some companies, the Directive on whistleblowers scrupulously excludes these issues in the definition of the material scope of tax whistleblowing.

Neither Sycophant nor *Robin Hood*, the figure of the Tax Whistleblower is yet to be constructed. We can wager that it will not only be used by governments, but that it will also contribute to better tax compliance in the service of a fair tax justice.

62. Beyond these policy issues, legal questions are raised about the articulation of the tax whistleblowing system (*de lege ferenda*) shaped by the Directive with the current system (*de lege lata*).

What about whistleblowers and breaches outside the scope of the Directive? We have explained why we consider it appropriate to extend whistleblower protection, *mutatis mutandis*, to all persons who communicate in good faith with the tax authorities whether or not they are acting in a work-related context. The straightforward exclusion from whistleblower protection for persons who act in the expectation of a financial reward, on the other hand, gives rise to difficulties which may undermine the readability of tax reporting.

What about information which falls within the scope of the Directive but whose reporting is already mandatory by virtue of a legal provision? We have shown that it may be reasonable, having regard to the right to privacy, to exclude such facts from the scope of the Directive.

Finally, which mechanism should be adopted: an integrated system of tax reporting or a juxtaposition of tax reporting mechanisms?

63. While the fear of implementing an integrated system of tax reporting is perfectly justified, such a measure has the significant merit, if well designed, of reducing the number of malicious tax reporting (because of the risk of sanctions) and increasing the number of useful tax reporting (because of the definition of the scope of the system). It goes without saying that whistleblower protection is not absolute. It is not a matter of giving a license to violate "tax secrecy" with impunity. The implementation of an integrated tax reporting system also increases transparency regarding the phenomenon of whistleblowing since it must necessarily include a reporting obligation on the part of the authorities managing the system and, where appropriate, accountability.[233]

One thing is certain: in this balancing exercise, the lawmaker cannot place blind trust in potential whistleblowers. At the risk of seeing history repeat itself, tax transparency has a price which is the strong compliance with the freedoms and rights of all the "stakeholders", requiring a rethink of our conception of "common good".

232. The distinction has been modeled on the basis of that of Jean-François Foegle, which was rooted in the dual conception of freedom of expression proposed by Robert Post (R. Post, *Constitutional Domains – Democracy, Community, Management*, Cambridge (MA), Harvard University Press, 1995): "Là où la conception 'démocratique' de la liberté d'expression vise à favoriser la participation des citoyens à la vie publique en garantissant la possibilité d'une expression politique dans la sphère publique, la conception 'managériale' de celle-ci est marquée par une logique instrumentale: la liberté d'expression n'est favorisée et rendue possible que dans les hypothèses où celle-ci permet aux pouvoirs publics de mener à bien des objectifs déterminés". See J.-Ph. Foegle, "Le lanceur d'alerte dans l'Union européenne: démocratie, management, vulnérabilité(s)" in M. Disant and D. Pollet-Panoussis (dir.), *Les lanceurs d'alerte. Quelle protection juridique? Quelles limites?*, Issy-les-Moulineaux, Lextenso, 2017, p. 110. In the same vein, see also W. Vandekerckhove, "Freedom of expression as the 'broken promise' of whistleblower protection", *RTDH* 2016, No. 10. In the media, see also P. Mbongo, "anning, Snowden ... Deux questions sur les 'lanceurs d'alerte'", *The Huffington Post.fr*, 31 July 2013 (accessed August 8, 2017).

233. As off-putting as the American system may be with regard to our legal system, it must be admitted that one can get an idea of how it works, and in particular of the rewards granted, through the reports published annually, whereas this is clearly not the case in Belgium.